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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

UNITED STATES OF AMERICA,
Petitioner,
v.

FRANKLYN C. NOFZIGER,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT**

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QUESTIONS PRESENTED

1. In a prosecution under 18 U.S.C. § 207(c), a provision of the Ethics in Government Act prohibiting former high-level government officers and employees, for one year after leaving office, from communicating with their former agencies with the intent to influence them, is the government required to allege and prove that the defendant knew that the matter on which he communicated was of "direct and substantial interest" to his former agency?

2. When concerns about fair warning are satisfied for an offense that already has a state-of-mind requirement, does the rule of lenity or the presumption in favor of *mens rea* as discussed in *Liparota v. United States*, 471 U.S. 419 (1985), require that any arguable ambiguity as to the applicable state-of-mind requirement be resolved by applying a stricter requirement to each element of the offense?



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**PETITION FOR A WRIT OF CERTIORARI TO THE
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Petitioner United States of America respectfully requests that the Court grant this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a) is reported at 878 F.2d 442. The statement of four judges of the court of appeals concurring in the denial of the suggestion for rehearing *en banc* is not yet reported and appears at App. 109a. The opinions of the district court, denying respondent's motion to dismiss the indictment and denying post-trial motions, are not reported and appear at App. 41a and 80a.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1989. A timely petition for rehearing was denied on September 5, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The statutory provision at issue, 18 U.S.C. § 207(c), was added to the pre-existing § 207 by the Ethics in Government Act of 1978, Pub. L. 95-521, tit. V, § 501(a), 92 Stat. 1865 (Oct. 26, 1978). It provides:

“Whoever, other than a special Government employee who serves for less than sixty days in a given calendar year, having been so employed as specified in subsection (d) of this section, within one year after such employment has ceased, knowingly acts as agent or attorney for, or otherwise represents, any one other than the United States in any formal or informal appearance before, or, with the intent to influence, makes any oral or written communication on behalf of anyone other than the United States, to—

(1) the department or agency in which he served as an officer or employee, or any officer or employee thereof, and

(2) in connection with any judicial, rulemaking, or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter, and

(3) which is pending before such department or agency or in which such department or agency has a direct and substantial interest—

shall be fined not more than \$10,000 or imprisoned for not more than two years, or both.”

The remaining provisions of § 207, extensively amended at the same time, appear at App. 110a.

STATEMENT

Respondent Nofziger was convicted on three counts of violating 18 U.S.C. § 207(c) by making certain written or oral communications on behalf of clients of his lobbying firm to certain White House officials within one year of his resigning as Assistant to the President for Political Affairs. He was sentenced to consecutive terms of two to eight months' imprisonment on each count, with all but 30 days of each suspended (for a total of 90 days' imprisonment), and to fines totalling \$30,000. The court of appeals reversed his conviction on the ground that the district court should have dismissed the indictment for failure to allege that Nofziger acted "knowingly" with respect to every element of the offense. The issue in the case is the proper construction of 18 U.S.C. § 207(c).

Section 207(c) restricts former high-level executive branch officials—those specified in § 207(d)—from lobbying their former agencies for one year after leaving government service. It does this by creating two offenses, one of "appearance" and one of "communication," and specifying the circumstances in which such conduct is prohibited.

On July 16, 1987, following investigation by the independent counsel appointed for this matter pursuant to 28 U.S.C. §§ 591-599, Nofziger was indicted on four counts of violating the "communication" offense defined by § 207(c).¹ Each count alleged that within one year after leaving the government, defendant Nofziger, having been employed in a covered position in the White House,

¹ He was also indicted on two counts of violating 18 U.S.C. § 207(a), but the government sought and obtained dismissal of those counts before trial. A redacted indictment, with the counts renumbered sequentially, was filed on January 15, 1988, and that renumbering was employed throughout the trial and post-trial proceedings. The later indictment is reprinted at App. 121a.

"with the intent to influence, made a written [or oral] communication on behalf of [a client of his lobbying firm] to [a White House officer or employee]. That written [or oral] communication of defendant NOFZIGER was made in connection with the particular matter of * * *, in which the White House then had a direct and substantial interest." App. 123a-126a & 128a.

In response to a pre-trial motion in which Nofziger contended that "knowingly" modified all the elements of both § 207(c) offenses, so that the government was required to prove that he knew the facts underlying each element of the communication offense, District Judge Flannery ruled that § 207 "is a 'public welfare' measure which places on defendants the burden of ensuring their compliance" and that "the phrase 'with the intent to influence' was intended by Congress to indicate the mental element required for a violation of the communication clause." App. 57a & 59a.

At the close of trial, the district judge gave no instruction on "knowingly." He instructed the jury as follows with respect to intent:

"An intent to influence is an intent to affect either opinion or action. For you to find that Defendant Nofziger made a communication with the intent to influence that is required for a 207(c) offense, you must find that he intended on behalf of someone, other than the United States, to have that communication influence the opinion or action of the person who is alleged to have received the communication in connection with the alleged particular matter." App. 134a.

The jury convicted Nofziger on three counts and acquitted him on one (Count II). One count on which he was convicted concerned his efforts to persuade Edwin Meese III, then the Counselor to the President, to assist Nofziger's client, Welbilt Electronic Die Corporation (later Wedtech Corporation), in obtaining a small engine

contract with the Department of the Army. Another concerned Nofziger's efforts, on behalf of his client the Marine Engineers Beneficial Association, to obtain White House assistance in the implementation of a program for civilian manning of U.S. Navy vessels. The third count on which he was convicted concerned Nofziger's efforts to obtain White House assistance in implementing a Presidential directive to the Department of Defense concerning the procurement of A-10 aircraft manufactured by Nofziger's client, the Fairchild Republic Corporation. The jury found beyond a reasonable doubt that each of these matters was of "direct and substantial interest" to the White House at the time of Nofziger's lobbying.²

On appeal, Nofziger contended, among other things, that the government was required but failed to prove he *knew* that he was communicating with his former agency regarding a "particular matter" in which it had a "direct" and "substantial" interest. The court of appeals addressed only that contention. It first ruled that the statute was ambiguous with respect to the application of the word "knowingly" in § 207(c), rejecting the government's contention that the language of the statute and the legislative history made it clear that "knowingly" did not apply to the "communication" offense at all, because that offense had its own mental element, "with intent to influence." Having concluded that the statute was ambiguous, the court, relying heavily on its reading of *Liparota v. United States*, 471 U.S. 419 (1985), invoked the "rule of lenity" as well as a presumption in favor of *mens rea* to resolve the perceived ambiguity in favor of applying "knowingly" to each of the elements of the communication offense defined by § 207(c). It stated

² In post-trial motions, Nofziger raised a number of challenges to the sufficiency of the jury instructions and of the evidence, although he did not reiterate his contention concerning the word "knowingly." The district judge denied those motions in a memorandum opinion filed April 7, 1988. App. 80a.

that it declined to treat the statute as a "public welfare" measure requiring no *mens rea* "without clear evidence of a congressional purpose to impose strict liability because of [the law's] potential for chilling speech." App. 26a. Accordingly, it concluded that the district court should have dismissed the indictment, and it reversed the conviction and remanded for further proceedings consistent with the opinion. App. 27a.

In dissent, Judge Edwards explained why the plain meaning and legislative history of the statute lead to the conclusion that "there is only one way to read section 207(c)" (App. 39a)—the government's way—and why the court had misread *Liparota* and misapplied the "rule of lenity." He stated that the panel decision "amounts to little more than 'judicial nullification' of a clear congressional enactment." *Id.*

The government filed a timely petition for rehearing and suggestion for rehearing *en banc*. Both were denied by orders dated September 5, 1989. App. -106a & 107a. Judge Edwards dissented without comment from the denial of the petition for rehearing by the panel. While no member of the court requested the taking of a vote on the suggestion for rehearing *en banc*, Judge Edwards filed a separate statement, concurred in by Chief Judge Wald and by Judges Mikva and Ruth B. Ginsburg, which reads:

"I think that the majority opinion in this case is clearly wrong; however, this is not a basis for *en banc* consideration by the court. Therefore, I concur in the denial of the suggestion for rehearing *en banc*. Any further consideration of this case must be pursuant to review by the Supreme Court." App. 109a.

On September 15, 1989, the court of appeals stayed issuance of its mandate through November 6, 1989, pending the filing of a timely petition for writ of certiorari in this Court.

REASONS FOR GRANTING THE PETITION

By imposing a requirement that the government allege and prove "knowledge" with respect to all the elements of any violation of 18 U.S.C. § 207(c), the court of appeals has substantially narrowed the reach of a critical provision of the conflict of interest rules relating to former government employees that were adopted in the Ethics in Government Act of 1978. In that Act, Congress sought to restore and enhance the public's perception of the integrity of government decision-making—a perception that Congress thought was lacking, in substantial part because of the spectacle of high-level government officials using the "revolving door" to turn their government service into lucrative lobbying businesses when the ink had barely dried on their resignations. Requiring the government to prove, beyond a reasonable doubt, that a former employee knew the subject of his or her lobbying was of "direct and substantial interest" to the employee's former agency imposes a burden on the government that will seriously impede prosecutions under the Act and that is not warranted by the statutory language, the legislative history, or the nature of the offense. In practical terms, such a requirement will reward purposeful ignorance or heedlessness.

Congress did not impose such a requirement. As we show below, the court of appeals erroneously rejected the natural reading of the statutory language and did so in the face of authoritative legislative history that bars any question about congressional intent.

While there is no conflict in the circuits on the meaning of this provision, no other court has addressed the issue, and no conflict is likely to arise if the decision below goes unreviewed. This is the seminal prosecution under the statute, brought by an independent counsel under the provisions of the Ethics in Government Act requiring such counsel for prosecutions of both current and recently resigned high-level government officials. See 28 U.S.C. § 591(b) (Supp. V 1987). In the circumstances, the

court of appeals' misconstruction of these Ethics in Government Act provisions deserves the attention of this Court.

The court of appeals also misconstrued this Court's discussion of the rule of lenity and the presumption in favor of *mens rea* in *Liparota v. United States*, 471 U.S. 419 (1985). The result is a decision that threatens the governmental interest in the enforcement of other provisions of § 207 and any other regulatory statute where there may be a perceived ambiguity in the state-of-mind requirement. In fact, *Liparota* and other decisions of this Court confirm the government's view: that where concerns about fair warning are satisfied, as they are here, courts should construe regulatory statutes such as this one to give effect to the natural reading of the statute and to effectuate the congressional purpose, not to apply a presumption in favor of *mens rea* to any perceived ambiguity.

A. The Undermining of an Important Provision of the Ethics in Government Act Deserves the Attention of this Court.

The issue of ethics in government is an important one for the federal government and for the American people. Section 207 and other ethics provisions of Title 18 require that current and former federal employees comply with certain ethical constraints. These are intended both to ensure ethical conduct and to foster public confidence that the public trust is kept.

Ethics in government are supervised and enforced predominantly through an administrative process. The President has established ethics offices within each executive branch agency to educate and advise current and former employees of the ethical constraints upon them. In Title IV of the Ethics in Government Act, Congress established the Office of Government Ethics and charged it with providing guidance to those various ethics offices and

to current and former employees. Pub. L. 95-521, tit. IV, 92 Stat. 1862 (1978), 5 U.S.C. app. at 1212 (1988).

Consistently with this administrative structure, § 207 (c) places the burden on the relatively sophisticated class of persons who are subject to its strictures to understand the ethical restraints on their post-employment activities, to make inquiry to government ethics officials if they have questions, and to conform their conduct to the law. For purposes of the "communication" offense defined by § 207(c), the requirement that a former employee communicate "with the intent to influence" an official of his or her former agency on a particular matter is sufficient to alert such persons that they are treading on dangerous ground if they hold discussions with their former agency during the one-year period addressed by that section. If such a person nevertheless wishes to attempt to influence his former agency, he should first seek to clear the communication with the agency ethics office. When such clearance is granted, no one contends that criminal liability could follow.

The court of appeals panel turned this statutory and administrative scheme on its head. Under the court of appeals interpretation, a former high-level government official such as Nofziger is free to communicate with his ex-colleagues in an attempt to influence them on matters that may be before them, so long as he is careful to avoid knowing too much about the details of just what his former agency is doing—thereby avoiding knowledge of the specific facts that would show the matter to be of "direct and substantial interest" to the agency.

When criminal sanctions for violations of § 207(c) are sought, the purpose is not the specific deterrence of the wrongdoer: by the time a § 207(c) prosecution is over, the one-year ban will have expired. Rather, in addition to punishment, the purpose is general deterrence. The threat of criminal enforcement is the steel that under-

girds the entire administrative structure to ensure ethics in government. Four judges of the court of appeals believe that the decision of their court corroding that undergirding is "clearly wrong," and they invited this Court to address the issue. This Court should accept the invitation because the issue is important to ethics in government.

B. The Decision Below That the Statute Is Ambiguous Is Clearly Erroneous.

1. *The language of the statute.* Section 207(c) applies for only one year, during which time former high-level government officials are precluded from lobbying their former agencies on particular matters which are pending before such agencies or in which such agencies have a direct and substantial interest. By contrast, §§ 207(a) and (b) prohibit specified types of lobbying by former government employees either indefinitely (§ 207(a)) or for two years (§ 207(b)). Section 207(c) is the broadest of the three bans in terms of the matters to which it applies, as well as the shortest in duration, and, along with § 207(b)(ii), the most limited in terms of the category of employees to which it applies.

In the government's view, § 207(c) naturally breaks into two offenses, each with its own state-of-mind requirement, as shown here by the inserted Roman numerals:

"Whoever, [being a covered former government official], within one year after such employment has ceased, [I] *knowingly* acts as agent or attorney for, or otherwise represents, anyone other than the United States in any formal or informal appearance before, or [II], *with the intent to influence*, makes any oral or written communication on behalf of anyone other than the United States, to—

(1) the department or agency in which he served as an officer or employee, or any officer or employee thereof, and

(2) in connection with any * * * particular matter, and

(3) which is pending before such department or agency or in which such department or agency has a direct and substantial interest—

[is subject to felony penalties].” (Emphasis added.)

Judge Edwards analyzed the grammar and punctuation of this passage at length (App. 32a-37a), and we shall not repeat that discussion. It is clear, however, that the comma after the words “appearance before” naturally marks the beginning of the definition of the separate communication offense. It is also clear that the communication offense, like the preceding appearance offense, begins with a distinct state-of-mind requirement: “with the intent to influence,” in contrast to “knowingly.” Thus, the natural reading is that “knowingly” is the mental element for the appearance offense and “with the intent to influence” is the mental element for the communication offense. If the “natural parallelism” of the language and syntax was meant to be ignored, it is likely that Congress would have punctuated the provision differently—by a dash after “knowingly,” for example, as Judge Edwards suggested below (App. 33a-34a).

The principal case relied on by the court of appeals as supporting its rejection of the government’s reading of the statute, *United States v. Johnson & Towers, Inc.*, 741 F.2d 662 (3d Cir. 1984), *cert. denied sub nom. Angel v. United States*, 469 U.S. 1208 (1985), concerned a statute significantly different from § 207(c), in that it did not define two separate offenses, each with an express mental element. The court below, however, found this “a distinction without a difference.” App. 11a. It said that if one removed the communication offense from § 207(c), the provision becomes syntactically identical to such cases as *Johnson & Towers* where statutory language has been found ambiguous, so that “knowingly” could reasonably be read to apply to all elements of the appearance offense,

including the "direct or substantial interest" element. It then declared that if, "[s]imilarly," one deletes the appearance clause, "the resulting language ('whoever . . . knowingly, with the intent to influence, makes any oral or written communication . . . in connection with a particular matter') clearly permits the inference that 'knowingly' attaches to all elements of the communication offense." App. 11a-12a. This statement simply begs the question, since, on the government's view, deleting the appearance clause deletes the word "knowingly" as well.³

2. *The legislative history.* Any doubts about relying on the language and structure of § 207(c) are resolved by the legislative history, which, on this very point, is as clear and authoritative as legislative history ever gets. It makes unmistakably clear that Congress intended that each of the two offenses defined by § 207(c) have its own state-of-mind requirement. The court of appeals plainly erred in finding that legislative history inconclusive.

When the Senate reported out the bill that became the Ethics in Government Act in 1978, its version of new § 207(c) placed the word "knowingly" before the definition of both the appearance offense and the communication offense as follows:

"(c) Whoever, * * * having been so employed * * * [as a covered employee,] within one year after his employment with the department or agency has ceased, knowingly—

(1) makes any appearance or attendance before, or

³ The Ninth Circuit has recently construed the same language from the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d)(2) (1982), that *Johnson & Towers* did and has expressly rejected the *Johnson & Towers* analysis. *United States v. Hoflin*, 880 F.2d 1033 (9th Cir. 1989), *rehearing denied*, — F.2d — (Sept. 11, 1989). Thus whatever support the court of appeals found in *Johnson & Towers* has been undermined.

(2) makes any written or oral communication to, and with the intent to influence the action of,

the department or agency in which he served, or any officer or employee thereof, if such appearance or communication relates to any particular matter which is pending before such department or agency * * *—

[shall be subject to felony penalties]." S. Rep. No. 95-170, 95th Cong., 1st Sess. 203 (May 16, 1977).

The House version, by contrast, was essentially identical to the bill as subsequently enacted, in pertinent language and in structure. The separate numbering of the appearance and the communication offenses had been dropped, and the critical phrase "with the intent to influence" had been moved from the middle to the front of the communication offense, to be parallel to the position of the term "knowingly" at the beginning of the appearance offense. H.R. Rep. No. 95-800, 95th Cong., 1st Sess. 9-10 (Nov. 2, 1977). The House Report did not explain the relevant differences from the Senate version.

The Conference Committee adopted the House version. With this background, it is highly significant that the Conference Committee Report explained the differences between the House version it was adopting and the Senate version by paraphrasing the essential language so as to highlight the different ways in which the two versions handled the "knowingly" element:

"The two elements of the House amendment on 18 USC 207(c) were that a former official—

(a) 'knowingly acts as agen[t] or attorney . . . or otherwise represents . . . in any formal or informal appearance before,';

(b) 'or, with the intent to influence, make[s] any oral or written communication . . . to . . .'

"The Senate bill covered any former official, who knowingly—(1) makes any appearance or attendance before, or (2) makes any written or oral communication to, and with the intent to influence the action of * * *

"* * *

"The conference adopted the House prohibition, with the modification that 18 USC 207(c) will include self-representation. * * *" H.R. Conf. Rep. No. 4756, 95th Cong., 2d Sess. 74-75 (Oct. 11, 1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 4381, 4390-91. *See* App. 119a-120a.

The Conference Committee Report went even further. Referring to an essentially identical paraphrase of the House and Senate versions of § 207(a), it stated, "It is understood that the two elements of the House language, as set forth above, are each independent of the other for the purposes of a violation of any subsection in which those terms appear." App. 118a.

These two passages from the Conference Report make it unmistakably clear that the conferees read the House version as the government does—as creating two offenses, each with its own mental element—and adopted the House version with that construction in mind.

The court of appeals gave no good reason for rejecting the obvious conclusion about congressional intent that flows from the Conference Report. This Court has repeatedly held that statements in committee reports are "the authoritative source for legislative intent," *Thornburg v. Gingles*, 478 U.S. 30, 43 n.7 (1986); *Garcia v. United States*, 469 U.S. 70, 76 (1984), and that statements in Conference Reports, in particular, "would be due great weight." *National Ass'n of Greeting Card Publishers v. United States Postal Service*, 462 U.S. 810, 832 n.28 (1983). Accordingly, compelling reasons for rejecting the plain meaning of that history were necessary.

The court of appeals interpreted the Conference Report as “fail[ing] to record” that the conferees “decided to adopt the House format with the conscious purpose of restricting the application of the adverb ‘knowingly’ to the appearance clause.” App. 16a. In fact, the Conference Report, most naturally read, records precisely that decision. The court of appeals found that “a likely explanation” for the Conference Report’s supposed failure to ascribe any reason for the selection of the House format rather than the Senate’s was that “the differences between the two were viewed as stylistic rather than substantive.” *Id.* The court, moreover, concluded its discussion of the Conference Report language by saying that the Report’s paraphrase of the House and Senate versions can be explained as “simply the way in which a member of the committee staff chose to highlight the facial differences between the two.” App. 17a. But if the difference between the two versions had been understood to be merely “facial,” there would have been no reason for anyone, even a committee staff member, to “highlight” them. The only likely explanation for the highlighting that occurred is that there was a perceived need to reflect what the conferees understood the differences between the two versions to be. Since the Conference Report was then the basis for final action in both houses, the paraphrase is inescapably significant.

Finally, the court’s description of the difference between the House and Senate versions as “relatively minor editorial changes” that do not “imply a substantive rather than a stylistic purpose” (App. 17a) ignores the fact—surely known to every member of Congress—that “relatively minor editorial changes” in statutory drafting often have major substantive effects.

3. *The court of appeals improperly relied on subsequent regulations.* The court of appeals found its conclusion buttressed by an interpretative regulation of the Office of Government Ethics (OGE) on § 207(b)(i) and

by an interpretative regulation of the Department of Justice (DOJ) on § 207(c). App. 19a-21a. Neither carries sufficient weight to overcome the plain meaning of the statute, as confirmed by its history.

Section 207(b)(i), relating to matters which were pending under one's official responsibility as an employee, has the same structure as § 207(c)—an appearance offense and a communication offense. See App. 110a-111a. The OGE regulation on § 207(b)(i) states that the subsection is inapplicable “unless at the time of the proposed representation * * * [the former employee] knows or learns that the matter had been under his or her responsibility.” 5 C.F.R. § 737.7(b)(4) (1989), issued February 1, 1980, 45 Fed. Reg. 7412. The court of appeals found this language entitled to deference because § 207(b)(i) has the same structure as § 207(c) and said it shows that OGE interprets the word “knowingly” as applying “not just to the phrase ‘acts as agent, or attorney for, or otherwise represents,’ but to the circumstances that make the representation unlawful.” App. 20a. But the quoted language addresses only the appearance offense of § 207(b)(i), not the communication offense, which, as in § 207(c), has its own mental element (“with the intent to influence”). Thus, the OGE has not expressed a view that “knowingly” modifies *any* element of the communication offense in § 207(b)(i), much less all the elements.

Moreover, the OGE regulations on § 207(a), which also has the same structure, and on § 207(c) itself, do not state that “knowingly” applies to all the elements. See 5 C.F.R. §§ 737.5 & 737.11. Indeed, those regulations support the government's view that it need not prove that a former official knew the extent of the agency's interest by indicating that the OGE thinks that former employees have a duty to inquire of their former agencies whether the United States has an “interest”, and, if so, whether the interest is “direct and substantial.” See 5 C.F.R. § 737.5(c)(5), Example 2 (the former agency

“must be consulted by the former employee before the representation can be undertaken”); *id.* § 737.11(f), Example 2 (if a matter is “likely to be of direct and substantial interest” to the former agency, the employee “may not communicate” with the agency, although he may do so “in order to determine whether it asserts a direct and substantial interest”; “[i]n the event of a negative answer to the question,” the former employee “may communicate”).

The Department of Justice regulation on § 207(c), 28 C.F.R. § 45.735-7(d) (1988), issued April 18, 1980, 45 Fed. Reg. 26,326, indeed states that “knowingly” applies to all the conduct prohibited by the subsection. But that regulation is not entitled to the deference due an agency charged with administering a statute, as the court of appeals admitted (App. 21a). The DOJ regulation does not outweigh the other evidence showing the correct reading of § 207(c).

4. *The government's interpretation of the § 207(c) communication offense better implements the congressional purpose.* Under the government's view of the statute, the government must prove that the defendant made a communication to an official of his former agency in connection with a particular matter in which such agency has a direct and substantial interest and that he “intended on behalf of someone, other than the United States, to have that communication influence the opinion or action of the person who is alleged to have received the communication in connection with the alleged particular matter.”⁴ That mental element is sufficient to ensure that the violator is aware of the nature of his activity and can take steps to conform it to the law.

⁴ See the district court's instruction. App. 134a. Thus, for example, it is open for a defendant to contend that he did not intend to influence the recipient at all or that he intended to influence the recipient on *another* matter.

It is implausible to believe that Congress, in using the words "with the intent to influence," intended the government *also* to allege and prove that defendant *knew* that he was communicating on a matter of "direct and substantial interest" to his former agency. First, it is inherently difficult to prove a defendant's state of knowledge about his former agency's current interests. Second, the statutory prohibition has a limited duration of only one year. Third, the prohibition covers only high-level employees who are presumptively knowledgeable about the existence of restrictions on lobbying by former employees; there is no unfairness in taxing those individuals with knowledge of their former agency's interests for one year. Fourth, the Ethics in Government Act itself created the Office of Government Ethics, which was charged with the responsibility of establishing a formal advisory opinion service and "promoting understanding of ethical standards in executive agencies." § 402(b) (8) & (14), 5 U.S.C. app. at 1213 (1988). Advisory opinions of that Office provide full immunity from prosecution. 5 C.F.R. § 738.309(b) (1989). Congress's general aim was clearly to ensure that government employees were informed of the ethical requirements and had reliable advice available to them. In these circumstances, in enacting what even the Senate described as a "1 year 'no contact' ban,"⁵ Congress is not likely to have intended to provide an incentive for purposeful ignorance by requiring proof of "knowledge" that the matter in question is one of "direct and substantial interest" to the former agency.⁶

⁵ S. Rep. No. 95-170, *supra*, at 152, reprinted in 1978 U.S. Code Cong. & Admin. News 4217, 4368.

⁶ Indeed, when Congress passed amendments to § 207 in 1988—later vetoed by the President—even though the bill placed the word "knowingly" at the beginning of the communication offense in § 207(c), the managers expressly stated that there was "no requirement to prove knowledge as to the other elements of the prohibited conduct, such as that the United States is a party or has a direct interest in the matter which is the subject of the lobbying." 134 Cong. Rec. S17142, 17144 (Oct. 21, 1988).

The court of appeals' crabbed reading of the statute and the legislative history in this case ignores that teaching and defeats the most likely interpretation of congressional intent in the Ethics in Government Act.

C. The Court of Appeals Misapplied the Rule of Lenity and the Presumption in Favor of *Mens Rea*.

One reason for the court of appeals' apparent straining to avoid the teaching of the legislative history appears early in its decision:

"To determine who is right [on the issue of whether there is any *mens rea* requirement applicable to the direct and substantial interest element], we must first decide whether, as the government claims, Congress has manifested an unambiguous intent to *impose strict liability for the communication offense by limiting the reach of 'knowingly' to the appearance offense*, with which Nofziger is not charged." App. 9a (emphasis added).

Limiting the word "knowingly" to the appearance offense does *not* "impose strict liability for the communication offense." The statute provides a specific mental element for that offense—"with the intent to influence"—and the government's position gives those words appropriate weight. Approaching the statute from the misleading premise that the government's position created a "strict liability" offense, the court of appeals relied heavily on the discussion of the "rule of lenity" and the general presumption in favor of *mens rea* in *Liparota v. United States*, 471 U.S. 419 (1985). But the court below took guidance from *Liparota* that goes far beyond its teaching and the teaching of other cases of this Court.

1. *The rule of lenity.* The "rule of lenity" states that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Liparota, supra*, 471 U.S. at 427, quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971). "Application of the rule of lenity en-

tures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability.” *Id.* But the rule “is not to be applied where to do so would conflict with the implied or expressed intent of Congress.” *Id.*

If the government is correct that § 207(c) is not ambiguous, then of course the rule has no application. This Court has cautioned that the rule of lenity “* * * only serves as an aid for resolving an ambiguity; it is not to be used to beget one. . . . The rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers.’” *United States v. Turkette*, 452 U.S. 576, 587-88 n.10 (1981) (citation omitted). Indeed, the rule is of uncertain weight because it “leaves open the crucial question—almost invariably present—of how much ambiguousness constitutes * * * ambiguity.” *United States v. Hansen*, 772 F.2d 940, 948 (D.C. Cir. 1985) (Scalia, J.), *cert. denied*, 475 U.S. 1045 (1986).

To the extent that the rule of lenity reflects a concern about “fair warning,” that concern is misplaced here. Section 207(c) applies to a small class of well-informed former public officials who, before and during the one year in which the statutory prohibition applies, have access to the Office of Government Ethics and to ethics officers in their former agencies for advice on permissible lobbying activities and rulings on the legality of their proposed conduct. Moreover, this is a class of individuals very likely to read the statute themselves (or have their lawyers read it). Thus, a defendant like Nofziger will not have been “surprised by a novel or unexpected interpretation of the law,” to quote again the words of Judge (now Justice) Scalia. *United States v. Hansen*, *supra*, 772 F.2d at 948-49.

In *United States v. Feola*, 420 U.S. 671, 684-85 (1975), the Court, finding no clear guidance in the language or history of the criminal statute, but finding "no risk of unfairness to defendants," saw its task as "effectuat[ing] the congressional purpose." The court below should have seen its task in the same light. Its failure to do so gave undue weight to the rule of lenity.

2. *The presumption in favor of mens rea.* Besides applying the rule of lenity, the court below gave independent weight to the "rule" that, "absent evidence of a contrary legislative intent, courts should presume *mens rea* is required," App. 22a, citing the statement in *Liparota* that "criminal offenses requiring no *mens rea* have a 'generally disfavored status.'" 471 U.S. at 426, quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 438 (1978).

In *Liparota* the Court construed a federal statute governing food stamp fraud that provided that "whoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by [the statute] or the regulations" shall be subject to fine and imprisonment. 471 U.S. at 420. In ruling that the government must prove that the defendant "knew that he was acting in a manner not authorized by statute or regulations," 471 U.S. at 421, this Court found it "particularly appropriate" to apply the general presumption in favor of *mens res* to resolve the ambiguity it found in the statutory language because "to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct." 471 U.S. at 426. "A strict reading of the statute with no knowledge-of-illegality requirement" would render criminal a food stamp recipient who, for example, "used stamps to purchase food from a store that, unknown to him, charged higher than normal prices to food stamp program participants." *Id.* Such a reading, the Court added, would also render criminal "a nonrecipient of food stamps who 'possessed' stamps be-

cause he was mistakenly sent them through the mail due to administrative error, 'altered' them by tearing them up, and 'transferred' them by throwing them away." *Id.* 426-27.

The court of appeals found this case "similar" to *Liparota*. App. 24a. In fact, the contrast could hardly be sharper. Rather than criminalizing a "broad range" of conduct, § 207(c) criminalizes an extremely narrow range—lobbying by former high-level officials addressed to their former agencies for one year, on particular matters of direct and substantial interest to that agency. Moreover, considerable recent history and the obvious concerns behind the enactment of the Ethics in Government Act show that such "influence peddling," even if it concerns matters thought not to be of direct and substantial interest to the agency, is not, in the words of *Liparota*, "apparently innocent" at all. One can hardly analogize the average citizens who were the subject of the Court's concern in *Liparota*—a food stamp recipient who is shopping and a non-recipient who, by error, receives food stamps in the mail and throws them away—with well-informed high-level government officials who, before and during the one year in which the statutory prohibition applies, have access to the Office of Government Ethics and to ethics officers in their former agencies for rulings on the legality of their proposed conduct, and who are likely to have legal counsel advising them before they do any lobbying.⁷ Applying the policy of *Liparota* to such individuals distorts that decision.

The other Supreme Court cases cited by *Liparota* as establishing the presumption in favor of *mens rea* also provide no support for the decision below. In *Morissette*

⁷ Indeed, when Nofziger formed his lobbying and consulting firm, he retained a law firm in part "to advise him in connection with the strictures of the Ethics in Government Act." Opening Brief for Appellant Nofziger in the court of appeals at 2-3 (Nov. 14, 1988).

v. *United States*, 342 U.S. 246 (1952), the Court ruled that the omission of any mention of intent in the federal enactment of certain common-law crimes that had always been construed to require intent would not be construed "as eliminating that element from the crimes denounced." *Id.* 263. Section 207(c), by contrast, has no such common-law antecedents. In *United States Gypsum Co.*, *supra*, the Court noted the "disfavored status" of "strict-liability" offenses in the context of determining whether criminal offenses defined by the Sherman Act, which mentions no mental element, should be construed to include intent as an element. 438 U.S. at 437-38. The communication offense in § 207(c), by contrast, expressly requires "the intent to influence," so that *Gypsum* was addressing a very different issue from that presented by § 207(c).

The district court, in denying Nofziger's motion to dismiss the indictment, concluded that § 207(c) "is a 'public welfare' measure which places on defendants the burden of ensuring their compliance." App. 57a. The court of appeals declined to characterize § 207(c) as falling into the category of "'public welfare' offenses, which 'depend on no mental element but consist only of forbidden acts or omissions,'" because "the activity with which it is concerned—lobbying—differs dramatically from the kind of activity that has usually been regulated by public welfare measures." App. 24a, *quoting Morissette*, 342 U.S. at 252-53. Reviewing a number of "public welfare" offense cases,⁸ the court of appeals concluded that "they deal with matters that may be presumed to be regulated *because of*

⁸ *E.g.*, *United States v. Freed*, 401 U.S. 601 (1971) (possession of unregistered hand grenades); *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558, 564-65 (1971) (transportation of hazardous materials); *United States v. Dotterweich*, 320 U.S. 277, 280-82 (1943) (distribution of adulterated food); *United States v. Holland*, 810 F.2d 1215, 1223-24 (D.C. Cir.), *cert. denied*, 481 U.S. 1057 (1987) (increased penalties on drug dealers operating within 1000 feet of a school).

their inherent danger." App. 25a. Moreover, the court continued:

"The district court notwithstanding, it is not enough that subsection 207(c) is intended 'to serve the public interest in honest government.' * * * While lobbying has been subjected to increased regulation, it is not inherently dangerous and, in fact, at least insofar as it constitutes self-representation, it has been found constitutionally protected. * * * [A]s the doer may not have knowledge of the circumstances that render his acts criminal, *one cannot assume that he will be alerted to their consequences.*" App. 25a-26a (emphasis added).

The government's position is not that § 207(c) is a type of "public welfare" measure for which it was appropriate to have *no* mental element at all. The communication offense of § 207(c) already has, by express terms, a mental requirement of "intent"—the same sort of requirement that the Court found necessary in *Morissette* and *United States Gypsum*. The government's position is simply that the offense is similar enough to measures for which no *mens rea* has been required that any presumption in favor of a specific *mens rea* requirement applicable to the "direct and substantial interest" element of the offense has little or no weight.

3. *The court of appeals gave undue weight to the constitutionally protected nature of lobbying activities in general.* As discussed above, the court of appeals gave significant weight to the perceived fact that the activities in the case at hand—"communicating with a government official with the intent to influence"—was "not only benign, but constitutionally protected." App. 26a. Lobbying the government, in general, indeed has First Amendment protection. *E.g., California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972). On the other hand, it has long been subject to regulation. See *United States v. Harriss*, 347 U.S. 612 (1954) (uphold-

ing constitutionality of the Federal Regulation of Lobbying Act, 2 U.S.C. §§ 261-270). Moreover, restrictions on First Amendment activities by federal employees have long been justified to reduce hazards to "fair and effective government." *United States Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 564-65 (1973). A one-year cooling-off ban on lobbying activities by former high-level government officials serves the same purpose.

Viewed from the standpoint of those on whose behalf former government officials are likely to lobby, the restriction imposed by § 207(c) is minimal. Organizations and individuals who want to make their views known may select a representative from almost the entire universe of professional lobbyists.

Viewed from the standpoint of the interests of the former officials themselves, Congress legislated with the First Amendment interests of those officials in mind and accommodated those interests through express exceptions to § 207(c).⁹ Under the circumstances, First Amendment considerations give no reason to apply the presumption in favor of *mens rea* to the direct and substantial interest element of § 207(c), and the court of appeals' approach is unnecessarily limiting when Congress legislates to regulate the post-employment conduct of government employees.

⁹ Section 207(i) expressly provides that § 207(c) shall not apply to appearances or communications by a former officer or employee concerning matters "of a personal and individual nature, such as personal income taxes or pension benefits"; nor shall § 207(c) prevent such an officer "from making or providing a statement, which is based on the former officer's or employee's own special knowledge in the particular area that is the subject of the statement, provided that no compensation is thereby received, other than that regularly provided for by law or regulation for witnesses." See also § 207(d)(2) (exception for appearances and communications by elected officials of State and local governments and lobbyists for State and local governments and lobbyists for State and local governments and certain educational and medical organizations).

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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November 3, 1989

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APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 22, 1988

Decided June 27, 1989

No. 88-3058

UNITED STATES OF AMERICA

v.

FRANKLYN C. NOFZIGER,

Appellant

Appeal from the United States District Court
for the District of Columbia

(D.C. Crim. No. 87-309-01)

Andrew L. Frey, with whom *Robert Plotkin*, *E. Lawrence Barcella*, and *Sandra L. Wilkinson* were on the brief, for appellant.

Richard A. Friedman, Associate Independent Counsel, with whom *James C. McKay*, Independent Counsel, and *Newman T. Halvorson*, Associate Independent Counsel, were on the brief, for appellee.

Kate Martin, *John A. Powell*, and *Steven R. Shapiro* were on the brief for *amicus curiae* American Civil Liberties Union, urging that the court vacate defendant's conviction.

Before EDWARDS, BUCKLEY, and WILLIAMS, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* BUCKLEY.

Dissenting opinion filed by *Circuit Judge* EDWARDS.

BUCKLEY, *Circuit Judge*: Franklyn C. Nofziger, former Assistant to the President for Political Affairs, appeals his conviction for violation of the Ethics in Government Act. We hold that under the section of the Act that Nofziger was convicted of violating, the government was required to prove that he had knowledge of all of the facts making his conduct criminal. Because the government offered no evidence demonstrating that Nofziger possessed such knowledge, we reverse his conviction.

I. BACKGROUND

A. Statutory Context

In 1987, former presidential aide Franklyn C. Nofziger was convicted on three counts of communicating with officials at the White House in violation of subsection 207(c) of the Ethics in Government Act, 18 U.S.C. § 207 (c). Congress adopted that subsection in 1978 as a result of a recommendation by President Jimmy Carter that it enact legislation to “strengthen existing restrictions on the revolving door between government and private industry.” He proposed that Congress do so by extending the period prohibiting certain contacts between a former official and his agency and by adopting a “new and broader ban on formal or informal contact on other matters with agencies of former employment, for a period of 1 year after the end of government service.” Message from the President Transmitting Proposed Ethics in Government Act of 1977, *reprinted in* H.R. Rep. No. 800, 95th Cong., 1st Sess. 85 (1977) (“House Report”).

To accomplish this second objective, President Carter proposed adding a second offense, that of communicating with an agency of former employment about certain matters, to the existing offense of acting as an agent or

attorney for another person in proceedings before such an agency. That second offense is set forth in subparagraph (2) of a new subsection 207(c) proposed in the draft legislation submitted with the President's message ("Administration draft"). It reads, in relevant part, as follows:

Whoever, having been so employed . . . , within one year after his employment with the department or agency has ceased, knowingly—

(1) acts as agent or attorney for or otherwise represents any other person (except the United States) in any formal or informal appearance before, or

(2) makes any contact on behalf of any other person (except the United States) with the intent to influence the department or agency in which he served as an officer or employee, or any officer or employee thereof, in connection with any . . . particular matter which is pending before such department or agency or in which such department or agency is a party or has a direct and substantial interest—

Shall be fined not more than \$10,000 or imprisoned for not more than two years, or both.

House Report at 96. After considering alternative Senate and House of Representative versions of the Carter recommendation, Congress adopted the present language of subsection 207(c):

Whoever, [being a covered government employee], within one year after such employment has ceased, knowingly acts as agent or attorney for, or otherwise represents, anyone other than the United States in any formal or informal appearance before, or, with the intent to influence, makes any oral or writ-

ten communication on behalf of anyone other than the United States, to—

(1) the department or agency in which he served as an officer or employee, or any officer or employee thereof, and

(2) in connection with any . . . particular matter, and

(3) which is pending before such department or agency or in which such department or agency has a direct and substantial interest—

shall be fined not more than \$10,000 or imprisoned for not more than two years, or both.

18 U.S.C. § 207(c) (1982).

The principal dispute in this case is over the reach of the word “knowingly.” Appellant Nofziger argues that the word modifies the entire sentence of which it is a part and thus requires knowledge of the specific circumstances that make the communication unlawful. The government contends that “knowingly” applies only to the offense described in the adjacent “appearance clause” (i.e., the clause that refers to an ex-official’s acting as agent or attorney in an appearance before a former agency) and not to that described in the “communication clause” (i.e., the clause that refers to any oral or written communication by such an official to his former agency).

This is not an idle grammatical inquiry. If Nofziger’s interpretation is correct, no one may be convicted under subsection 207(c) unless it is proven that he had knowledge of each of the facts constituting the offense. On the other hand, under the government’s interpretation, if an ex-official tries to interest his former agency in a particular project in the *mistaken* belief that it had no “direct and substantial interest” in it, he will have committed a felony punishable by up to two years in jail.

B. Factual Background

On July 16, 1987, a grand jury indicted appellant Nofziger on four counts alleging violations of subsection 207(c) and two counts alleging violations of subsection 207(a). On its own motion, the government later sought and obtained dismissal of the subsection 207(a) counts. Trial on the remaining counts began on January 11, 1988. The court submitted the case to the jury on February 10, 1988, and on February 11 the jury returned its verdict finding Nofziger guilty on three of the counts. On April 8, 1988, the trial court sentenced Nofziger to consecutive terms of imprisonment of two to eight months on each of the three counts and levied fines totalling \$30,000. All but thirty days of each term were suspended, leaving a sentence of ninety days' imprisonment. The district court stayed the execution of appellant's sentence pending this appeal.

Nofziger served as Assistant to the President for Political Affairs in the Reagan White House for exactly one year beginning January 21, 1981. After resigning his position, he and a business associate, Mark Bragg, established the government relations and political consulting firm of Nofziger-Bragg Communications. The three counts upon which Nofziger was convicted alleged that certain lobbying undertaken by Nofziger on behalf of three of his firm's clients violated subsection 207(c).

First, the grand jury found that Nofziger violated the Act by sending a letter dated April 8, 1982, to Edwin Meese III, then Counselor to the President, urging the White House to support the Welbilt Electronic Die Corporation in its efforts to secure a contract from the Army for the manufacture of more than 13,000 small engines. Welbilt was a minority-owned business located in the South Bronx, an economically distressed area of New York City. Pursuant to a program granting special benefits to minority-owned businesses, the Small Business Administration ("SBA") designated Welbilt as the only

company eligible to negotiate for the engine contract under a special minority enterprise set-aside program. The Army had authority to withdraw the engine contract from the program and to solicit competitive bids from other companies if the Army, Welbilt, and the SBA could not agree on a price for the engines that was satisfactory to the Army. Nofziger's letter informed Meese that Welbilt was "having some problems with the Army" and advised Meese that in light of President Reagan's commitment to the revitalization of the South Bronx, "it would be a blunder not to award [the engine] contract to Welbilt."

Second, the grand jury concluded that Nofziger violated subsection 207(c) by forwarding to James E. Jenkins, then Deputy Counselor to the President, a copy of a letter that Nofziger had previously sent to the President of the National Marine Engineers Beneficial Association, AFL-CIO ("MEBA"), a labor union representing licensed maritime officers. On this copy, Nofziger appended a note advising Jenkins that MEBA's president had supported "all the President's endeavors" and urging Jenkins to help MEBA by securing "civilian manning," i.e., the use of civilian crews on noncombat navy vessels.

Third, the grand jury found that Nofziger violated the Act through his efforts on behalf of the Fairchild Republic Corporation ("Fairchild"), a division of Fairchild Industries, Inc. Fairchild's main product was the A-10 antitank aircraft. Prior to 1982, the Air Force had purchased a number of A-10's, but, contrary to the President's budget request, Congress did not authorize the expenditure of any money for A-10 purchases for Fiscal Year ("FY") 1983. On August 20, 1982, the President addressed a memorandum to Secretary of Defense Caspar Weinberger in which he urged the Secretary to encourage export sales of the A-10 or take other measures to keep the aircraft in production at the level requested in the President's FY 1983 budget. The grand jury found that

Nofziger illegally encouraged White House officials to implement the President's directive when Nofziger met with members of the National Security Council staff on or about September 24, 1982.

Prior to trial, Nofziger filed a series of motions challenging his indictment on various grounds and seeking forms of pre-trial relief, all of which were denied. See *United States v. Nofziger*, Crim. Action No. 87-0309 (D.D.C. Nov. 10, 1987) ("Memorandum Opinion"). Following his conviction, Nofziger moved for judgment of acquittal or, in the alternative, for a new trial—again without success. See *United States v. Nofziger*, Crim. Action No. 87-0309 (D.D.C. Apr. 7, 1988).

On appeal, Nofziger challenges his conviction on the following grounds: (1) The government neither alleged, nor did it prove, that Nofziger had actual knowledge of the facts that rendered his communications unlawful under subsection 207(c); (2) the district court misconstrued the term "direct" in subsection 207(c); (3) even if one accepts the district court's construction of the subsection, the evidence was insufficient to prove that the White House had a "direct" and "substantial" interest in two of the matters that were the subject of the communications; and (4) if the district court properly construed the phrase "direct and substantial interest," the statute is unconstitutionally vague as applied to Nofziger in this case.

II. DISCUSSION

As the district judge stated during the course of the trial,

the big problem with this case is that we are dealing with a statute that is hardly a model of clarity.

Record at 3416, *United States v. Nofziger*, Crim. Action No. 87-0309.

Stripped of all language not directly pertinent to this case, subsection 207(c) reads as follows:

Whoever, [being a covered former employee], within one year after such employment has ceased, knowingly acts as agent or attorney for, or otherwise represents, anyone other than the United States in any formal or informal appearance before, or, with the intent to influence, makes any oral or written communication on behalf of anyone other than the United States, to—

(1) the agency in which he served, or any officer or employee thereof,

(2) in connection with any particular matter

(3) in which such agency has a direct and substantial interest—

shall be [subject to felony penalties].

Thus the subsection criminalizes two separate activities—that of representing someone other than the United States in an appearance before an agency of former employment (“appearance offense”), and that of communicating with the agency on behalf of such a person (“communication offense”). In each instance, the subject of the appearance or communication must be a “particular matter” that is either pending before, or of “direct and substantial interest” to, that agency.

The parties agree that an ex-official may lawfully lobby his former agency the day after he has left it with the purpose of *stimulating* its interest in a matter of importance to a private client *so long as* that matter is not already before the agency and the agency does not already have a direct and substantial interest in it. If, however, the agency should already have such an interest, the government contends that what would otherwise have been an entirely innocent communication is transformed into a felony punishable by two years in jail *even though* the former official had no knowledge of the fact. Thus, the government’s interpretation would impose strict crim-

inal liability on a lobbyist (by definition, one who communicates with the intent to influence) who is misinformed as to what matters are of current interest to his former employer. Nofziger, on the other hand, maintains that a former employee cannot be found in violation of subsection 207(c) unless it can be shown that he had knowledge that the agency had a "direct and substantial" interest in the matter.

To determine who is right, we must first decide whether, as the government claims, Congress has manifested an unambiguous intent to impose strict liability for the communication offense by limiting the reach of "knowingly" to the appearance offense, with which Nofziger is not charged. If we find the statute to be ambiguous on this point, we must then apply certain principles of construction applicable to criminal statutes in order to determine whether knowledge of the operative facts is essential to a conviction under subsection 207(c).

The question of ambiguity

In rejecting Nofziger's contention that the word "knowingly" applies to the communication offense and requires actual knowledge of the facts that bring it into play, the district court stated:

The court does not believe this pervasive, super-modifying role [assigned the word "knowingly"] can be reconciled with common usage. Nor can the court accept this reading without some clear indication that Congress intended such a less-than-obvious result.

Memorandum Opinion at 22. We begin by examining the statutory language to see whether, as the court suggests, the question can be resolved through an appeal to common usage.

Adverbs frequently modify strings of clauses. In *Liparota v. United States*, 471 U.S. 419 (1985), the

Supreme Court was required to interpret a federal statute dealing with food stamp fraud. The key provision, section 2024(b)(1), penalizes anyone who

knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by [the statute] or the regulations.

7 U.S.C. § 2024(b)(1) (1982). The question at issue in *Liparota* was whether the adverb “knowingly” applied only to the verbs that it preceded or whether the government had to prove that the defendant also knew that his actions were not authorized by the statute or the regulations. The Court determined that section 2024(b)(1) was unclear in this regard: “Either interpretation would accord with ordinary usage.” *Id.* at 424. Two circuits independently reached the same conclusion when called upon to interpret the same provision. In *United States v. Marvin*, the Eighth Circuit stated:

To read “knowingly” as having nothing to do with the phrase “in any manner not authorized” is, we suppose, verbally tenable, but it is not the only meaning the words will bear, not even, we think, the more natural one.

687 F.2d 1221, 1226 (8th Cir. 1982). *See also United States v. O'Brien*, 686 F.2d 850, 852 (10th Cir. 1982) (the section “is ambiguous. The statute can be read either way.”).

The Third Circuit’s decision in *United States v. Johnson & Towers, Inc.*, 741 F.2d 662 (3d Cir. 1984), is also instructive. In *Johnson*, the court was required to interpret a criminal statute that applied to any person who

(2) knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter either—

(A) without having obtained a permit under section 6925 of this title . . . or

(B) in knowing violation of any material condition or requirement of such permit.

At issue was whether the requisite knowledge was limited to the acts of treating, storing, and disposing. The court concluded, on the basis of its textual analysis, that "knowingly" applied to both subparts (A) and (B), declaring that "[a]s a matter of syntax we find it no more awkward to read 'knowingly' as applying to the entire sentence than to read it as modifying only 'treats, stores or disposes.'" 741 F.2d at 668.

These cases are distinguishable, of course, because the statutory provisions with which they deal do not have inserted in them, as in this case, a separate offense that is subject to its own distinct mental state, namely, the intent to influence. We suggest, however, that this is a distinction without a difference. If one removes the communication offense and its "intent to influence" modifier from subsection 207(c), the resulting text, reduced to essentials, will read as follows:

Whoever, [being a covered government employee], within one year after such employment has ceased, knowingly acts as agent or attorney for, or otherwise represents, anyone other than the United States in any formal or informal appearance before the agency in which he served in connection with any particular matter in which such agency has a direct or substantial interest shall be [subject to felony penalties].

Clearly, such a provision would be indistinguishable, syntactically, from the provisions in the cited cases that the Supreme Court and the Third, Eighth, and Tenth Circuits found to be ambiguous. Thus "knowingly" can reasonably be read to apply to all elements of the appearance offense, including the "direct or substantial interest" element that is common to both offenses. Similarly, if one deletes the appearance clause, the resulting language

("whoever . . . knowingly, with the intent to influence, makes any oral or written communication . . . in connection with a particular matter") clearly permits the inference that "knowingly" attaches to all elements of the communication offense.

It is the government's position, however, that subsection 207(c) is distinguishable from the provisions at issue in *Liparota* and *Johnson* because of the particular manner in which the appearance and communication offenses are handled. The government argues that the subsection's grammar, syntax, and punctuation compel the conclusion that Congress intended to limit the requirement of actual knowledge to the clause immediately following the word "knowingly." We quote the analysis presented in the government's brief in its entirety:

First, the common element of both offenses that immediately precedes the appearance clause—"within one year after such employment has ceased"—is closed with a comma, which plainly marks the end of that element and the beginning of the appearance clause. Second, the appearance clause and the communication clause have a parallel structure: each begins with its mental element, each ends with a preposition relating it to the other common elements of both offenses, and each repeats the "on behalf of" phrase. Finally, the appearance clause and the communication clause are separated with a conjunction, "or," double bracketed with commas.

Government's Brief at 19-20.

The government maintains, further, that this linguistic analysis is compelled by subsection 207(c)'s legislative history, which we will examine before returning to the analysis itself. The government places particular reliance on the Report of the Conference Committee that considered the alternative versions of subsection 207(c) that had been adopted by the Senate and the House of

Representatives. That report provides the following paraphrase of "the two elements," i.e., the independent appearance and communication offenses, contained in the House's version of the subsection:

a former official who—

(a) "knowingly acts as agent or attorney . . . or otherwise represents . . . in any formal or informal appearance before,";

(b) "or, with the intent to influence, make[s] any written or oral communication . . . to . . ."

H.R. Rep. No. 1756, 95th Cong., 2d Sess. 74 (1978) ("Conference Report") (ellipses in original). The Conference Report describes the Senate version of subsection 207(c) as covering

any former official, who "knowingly—(1) makes any appearance or attendance before, or (2) makes any written or oral communication to, and with the intent to influence the action of . . ."

Id. at 74-75 (ellipsis in original).

The government notes that in reporting the adoption of the House provision, the Conference Report states: "It is understood that the two elements of the House language, as set forth above, are each independent of the other for the purposes of a violation of any subsection in which those terms appear" (referring to the fact that subsections 207(a), (b), and (c) contain identical language describing the appearance and communication offenses). *Id.* at 74. Because, in the Conference Report's paraphrase of the House alternative, the word "knowingly" appears as an integral part of the first element, the government concludes that the conferees' adoption of the House version reflected a conscious decision to limit the application of "knowingly" to the appearance clause. However appealing this argument, we must keep in mind

that Congress codified the provision submitted by the House, not the paraphrase.

The only other support for its conclusion that the government offers from legislative history is a single exchange, on the House floor, between Congressmen Wiggins and Danielson. The former sought to delete the communication offense because it would "expand the scope of section 207 significantly"; the latter defended its inclusion by noting that the communication offense required an "intent to influence." 124 Cong. Rec. 32,008 (1978). Because Congressman Danielson failed to *state* that the offense must also occur knowingly, the government concludes that Congress could not have *intended* that the offense be so qualified. What the reference to this exchange illustrates is not Congress' state of mind but, rather, why such gleanings from the *Congressional Record* should be rejected in any serious attempt to interpret an act of Congress. Cf. *International Bhd. of Elec. Workers, Local Union 474 v. NLRB*, 814 F.2d 697, 715 (1987) (Buckley, J., concurring).

We begin our analysis of subsection 207(c) with its genesis, which was President Carter's proposal that Congress broaden the scope of the Ethics in Government Act by adding a second offense to the appearance offense that was then the subject of section 207. That new offense was defined, in the Administration's draft of subsection 207(c) (which is more fully quoted at page 3 above), as

mak[ing] any contact on behalf of any *other* person (except the United States) with the intent to influence the department or agency [with which the covered official had formally served with respect to any matter] which is pending before such department or agency or in which such department or agency is a party or *has a direct and substantial interest*.

Id. at 96 (emphasis added). Thus the communication offense as framed in the President's proposal would per-

mit self-representation and include, among the matters as to which contact was to be prohibited, those in which the department or agency had a "direct and substantial interest."

The Senate and House Judiciary Committees held hearings on the President's proposal, and each body adopted versions of the Administration draft that were then referred to the Senate-House Conference Committee. The Senate version retained the format used in the Administration draft ("knowingly—(1) makes any appearance or attendance before, or (2) makes any written or oral communication to, and with the intent to influence the action of . . ."), broadened the scope of the prohibited communication to include self-representation, and eliminated the Administration's reference to matters that were of "direct and substantial interest" to the department or agency in question. The House version, on the other hand, adopted the format now enacted into law ("knowingly acts as agent or attorney . . . in any formal or informal appearance before, or, with the intent to influence, makes any oral or written communication . . .") and retained the Administration's language permitting self-representation and its reference to matters of direct and substantial interest to an agency.

These were the textual differences with which the conference was required to deal. The Conference Report offers no clue as to the nature of the discussion between the Senate and House conferees. It merely reports the way they resolved the differences:

The conference adopted the House prohibition, with the modification that 18 U.S.C. 207(c) will include self-representation. The conference also adopted the House language, contained in subsection (c)(3), to prohibit contact by a former official with his former agency, either on matters pending before that agency or on matters in which the former agency has a

direct and substantial interest. Thus contact is proscribed, . . . provided that the agency has a "direct and substantial interest" therein.

Id. at 75. If the conferees decided to adopt the House format with the conscious purpose of restricting the application of the adverb "knowingly" to the appearance clause, the Conference Report fails to record that critical fact even though it takes specific note of their decision to retain the Senate's prohibition against self-representation and the House's inclusion of matters in which an agency has a "direct and substantial interest."

It seems to us that a likely explanation for the Conference Report's failure to ascribe any reason for the selection of the House's format rather than the Senate's is that the differences between the two were viewed as stylistic rather than substantive. This explanation is not at necessary odds with the manner in which the Conference Report has paraphrased the House proposal: "(a) 'knowingly acts as agent . . . in . . . appearance before'; (b) 'or, with the intent to influence, make[s] any written or oral communication'" That formulation is first used in the Conference Report's discussion of the "Prohibition under 18 U.S.C. 207(a) (lifetime ban)," in which "[t]he two elements of the House amendment" (the appearance and communication offenses) are contrasted with the single element (the appearance offense) contained in the Senate amendment to subsection 207(a). *Id.* at 74. The Conference Report then states that "[i]t is understood that the two elements of the House language, as set forth above, are each independent of the other for the purposes of a violation of any subsection in which those terms appear." *Id.*

The focus of the Conference Report thus seems to be on affirming that the conferees agreed that both elements of the House version of subsection 207(a) were to be included in subsection 207(b) and (c) as well. This

purpose, however, falls well short of implying a concomitant decision to eliminate the requirement of actual knowledge of the circumstances giving rise to the offenses. We believe the Report's paraphrase of the House and Senate versions can as readily be explained as simply the way in which a member of the committee staff chose to highlight the facial differences between the two.

Similarly, the grammar, syntax, and punctuation of the final versions of subsection 207(c) can readily be explained in terms of simple editing. If we begin with the Administration draft (see text at page 3 above), blue-pencil the dash after the word "knowingly" and the numbers used to identify the two separate offenses, and then move the phrase "with the intent to influence" from the end of the communication clause to its beginning, we have the House version—grammar, syntax, commas, and all. We are not persuaded that such relatively minor editorial changes imply a substantive rather than a stylistic purpose. What these changes *have* accomplished is to strand the *mens rea* "knowingly" in a grammatical no man's land in which it is uncertain whether it applies to both offenses (as would have been the case if the dash in the White House draft had been retained), or just the appearance offense (which would have been clear had Congress chosen to codify the Conference Report's paraphrase of the House version of subsection 207(c)). As Congress followed neither course, we *are* left with language that is as amenable to one interpretation as the other.

The government nonetheless argues that the parallel structures of the appearance and communication clauses, as it reads them, require that each be allocated one of the two *mens rea* specified in subsection 207(c). The implication appears to be that *because* the communication clause is subject to the specific "intent to influence" requirement, it cannot at the same time be subject to the "knowingly" requirement. There is nothing in law or

logic, however, to suggest that a specific *mens rea* cannot coexist with one of more general application.

The Model Penal Code provides several analogies that would support the applicability of both *mens rea* requirements to the communications offense. For example, section 221.1(1) of the Code states that a person "is guilty of burglary if he enters a building . . . with purpose to commit a crime therein." Section 221.1(2) further provides that "[b]urglary is a felony of the second degree if it is perpetrated in the dwelling of another at night." The comments to the Code make clear that notwithstanding the requirement of a specific purpose, the culpability required as to the other elements of the crime is satisfied if the person acted "purposefully, knowingly or recklessly." See Model Penal Code § 2.02(3) (culpability requirement in absence of specific provision). As explained in Comment 6 to section 2.02:

Since an actor must have a "purpose" to commit a crime within a building to be guilty of burglary when he enters the building, the definition of the offense might be thought to be ambiguous as to what culpability level applies to elements like "dwelling house" and "night." Must the actor know that he is entering a dwelling house in order to be convicted of a second degree felony, or is some lesser culpability level sufficient?

Section 2.02(3) [default culpability provision] should control elements of this character, and therefore recklessness should suffice in the absence of special provision to the contrary In the burglary illustration, the phrase "with purpose to commit a crime therein" plainly does not make purpose the required level of culpability with respect to all material elements of the offense.

The Code contains several other provisions that specify certain purposes that are separate from the culpability required for the other elements of the offenses. See, e.g., § 223.2 (Theft by Unlawful Taking or Disposition);

§ 224.2 (Simulating Objects of Antiquity, Rarity, etc.); § 224.3 (Fraudulent Destruction, Removal or Concealment of Recordable Instruments). In all but one of these sections, the purpose requirement is set apart from the rest of the language by commas, just as the "intent to influence" requirement is in subsection 207(c) of the Ethics in Government Act. Thus, in the case at hand, a requirement that the communication be made with the "intent to influence" is not inherently incompatible with a parallel requirement that the other elements of the communication offense be subject to the "knowingly" *mens rea*.

The only other comment we would make about the government's interpretation of subsection 207(c) is that it seems highly unlikely that the conferees would have chosen to limit the scope of "knowingly" to the narrow act of serving as an agent or attorney for, or otherwise representing, a party in a formal or informal appearance before a government agency. It is hard to believe that anyone could act in such a capacity with other than full knowledge. At oral argument, counsel for the government suggested that this restrictive application of the word could be explained as dealing with the possibility that a former official might be found to have made an appearance as the implied, or unwitting, agent for someone else. But as the American Civil Liberties Union noted in its *amicus* brief, "it hardly seems likely that this improbable scenario is what Congress had in mind when it added 'knowingly' to the statute. Much more plausible is the conclusion that Congress intended to require knowledge of the circumstances that made an appearance or communication unlawful." ACLU Brief at 6-7.

We note, finally, that an Office of Government Ethics ("OGE") interpretation of identical language in subsection 207(b), issued February 1, 1980 (*see* 45 Fed. Reg. 7412 (1980)), buttresses our conclusion that the grammar, syntax, and punctuation of subsection 207(c) do not require acceptance of the government's view that the word

"knowingly" can only apply to the appearance clause. Although the OGE, which is charged with administering the Ethics in Government Act, has not issued any regulation interpreting subsection 207(c), it has issued one interpreting subsection 207(b)(i), which applies to

whoever having been so employed [in certain jobs enumerated in subsection 207(a)], within two years after his employment has ceased, *knowingly acts as agent or attorney for, or otherwise represents, any other person (except the United States), in any formal or informal appearance before, or, with the intent to influence, makes any oral or written communication on behalf of any other person (except the United States)* to [an agency in connection with a matter in which the agency has a direct and substantial interest and which was actually under his official responsibility within one year of his termination.]

18 U.S.C. § 207(b)(i) (1982) (emphasis added).

The OGE regulation states that subsection 207(b)(i) is inapplicable "unless at the time of the proposed representation . . . [the former employee] *knows or learns* that the matter had been under his or her responsibility." 5 C.F.R. § 737.7(b)(4) (emphasis added). In other words, the OGE interprets the word "knowingly," in subsection 207(b)(i), as applying not just to the phrase "acts as agent, or attorney for, or otherwise represents," but to the circumstances that make the representation unlawful. While it is true, as the government points out in its brief, that the regulation deals with another subsection, the language being interpreted is identical in both subsections. Moreover, the OGE's interpretation is entitled to deference. Cf. *E.I. du Pont de Nemours & Co. v. Collins*, 432 U.S. 46, 54-55 (1977) (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969) (following "venerable principle that the construction of a statute by those charged with its execution should be

followed unless there are compelling indications that it is wrong'").

Although not charged with administering the Act, on April 18, 1980 (*see* 45 Fed. Reg. 26,326 (1980)), the Department of Justice ("DOJ") issued a regulation interpreting subsection 207(c) that also supports Nofzinger's reading. As interpreted by the DOJ, subsection 207(c) provides that

[no covered employee] shall, within one year after such employment has ceased, knowingly engage in the conduct described in the next sentence. The prohibited knowing conduct is that of acting as attorney or agent . . . in any formal or informal appearance before, or with the intent to influence making any oral or written communication . . . (1) to the Department of Justice, or any employee thereof, (2) in connection with any rulemaking or any [other described] matter . . . , and (3) which is pending before this Department or in which it has a direct and substantial interest.

28 C.F.R. § 45.735-7(d) (1988). By asserting that covered employees cannot "knowingly engage in the conduct" described in the second sentence of the above-quoted passage and then listing all the elements of subsection 207(c), the DOJ expresses its view that the subsection's requirement of knowledge applies to all elements of the subsection.

In sum, we find nothing in the text of subsection 207(c), or in its legislative history, or in official interpretations of the statute, that will support the government's contention that the subsection unambiguously limits the reach of "knowingly" to the appearance clause.

Resolving the ambiguity

Having concluded that subsection 207(c) is ambiguous, we must next decide how to resolve the ambiguity. Two

canons of statutory construction require that an ambiguous criminal statute be interpreted in the defendant's favor. The first of these is the rule of lenity: "'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" *United States v. Bass*, 404 U.S. 336, 347 (1971) (citation omitted). In *Bass*, the Supreme Court emphasized the venerable position that the rule occupies in Anglo-American jurisprudence:

This principle [rule of lenity] is founded on two policies that have long been part of our tradition. First, "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." . . . Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies "the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should."

Id. at 348 (citations omitted). More recently, the Court noted that

[a]lthough the rule of lenity is not to be applied where to do so would conflict with the implied or expressed intent of Congress, it provides a time-honored guideline when the congressional purpose is unclear.

Liparota v. United States, 471 U.S. 419, 427 (1985).

The second applicable rule states that absent evidence of a contrary legislative intent, courts should presume *mens rea* is required. See *Liparota* at 426 ("criminal offenses requiring no *mens rea* have a 'generally disfavored status'" (citations omitted)). This presumption so pervades our system of criminal justice that the Court

"has on a number of occasions read a state-of-mind component into an offense even when the statutory definition did not in terms so provide." *United States v. United States Gypsum Co.*, 438 U.S. 422, 437 (1978) (government must prove intent as element of criminal antitrust case even though Sherman Act silent on *mens rea*). As Justice Jackson explained, in speaking of the common law tradition, *mens rea*

is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

Morissette v. United States, 342 U.S. 246, 250-51 (1952). In contrast to civil liability, a criminal conviction expresses society's condemnation of culpable conduct; therefore,

[u]sually the stigma of criminal conviction is not visited upon citizens who are not morally to blame because they did not know they were doing wrong. If Congress wishes to depart from that norm, it may do so, but in general it must manifest its intention by "affirmative instruction."

United States v. Marvin, 687 F.2d 1221, 1226 (8th Cir. 1982) (quoting *Morissette* at 273).

For two reasons, the presumption of *mens rea* is particularly strong in the context of subsection 207(c). First, the offense involves a felony. See *United States v. O'Brien*, 686 F.2d 850, 853 (10th Cir. 1982) (general rule especially applicable when felony charged). Second, the presumption carries particular force where "to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct." *Liparota*, 471 U.S. at 426. For example, in *Liparota*, the Court applied the *mens rea* presumption because to do otherwise would, among other things, render criminal the actions of a food

stamp recipient who “used stamps to purchase food from a store that, unknown to him, charged higher than normal prices to food stamp program participants.” *Id.* Similarly, if we were to adopt the government’s interpretation of subsection 207(c), we would criminalize the actions of any former government official who lobbies his agency on a matter in which, unknown to him, the agency has acquired a direct and substantial interest.

The government argues that even if we decide that subsection 207(c) is ambiguous as to the scope of the knowledge required of an offender, the rule of lenity and the presumption of *mens rea* are inapplicable because subsection 207(c) falls in the category of statutes penalizing “public welfare” offenses, which “depend on no mental element but consist only of forbidden acts or omissions.” *Morissette*, 342 U.S. at 252-53. Unlike the district court (*see* Memorandum Opinion at 19-21), we decline to characterize subsection 207(c) as such because the activity with which it is concerned—lobbying—differs dramatically from the kind of activity that has usually been regulated by public welfare measures. As the Supreme Court noted in *Liparota*,

[i]n most previous instances, Congress has rendered criminal a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community’s health or safety.

471 U.S. at 433. Among the cases cited by the Court was *United States v. Freed*, 401 U.S. 601 (1971), where it upheld the defendant’s conviction for possession of unregistered hand grenades under a statute making it criminal for a person “to receive or possess a firearm which is not registered to him.” The *Freed* Court stated that the government did not have to demonstrate that the defendant knew the hand grenades were unregistered because “[t]his is a regulatory measure in the interest of public safety, which may well be premised on the theory

that one would hardly be surprised to learn that possession of hand grenades is not an innocent act." *Id.* at 609. See also *United States v. International Minerals & Chemical Corp.*, 402 U.S. 558, 564-65 (1971) (transportation of hazardous materials); *United States v. Dotterweich*, 320 U.S. 277, 280-82 (1943) (distribution of adulterated food); *United States v. Holland*, 810 F.2d 1215, 1223-24 (D.C. Cir. 1987) (characterizing statute that imposed increased penalties on drug dealers operating within 100 feet of a school as a public welfare statute because "[a] reasonable person would know that drug trafficking is subject to stringent public regulation").

The pattern that emerges from these cases is clear. They deal with matters that may be presumed to be regulated *because* of their inherent danger. The district court notwithstanding, it is not enough that subsection 207(c) is intended "to serve the public interest in honest government." Memorandum Opinion at 21. While lobbying has been subjected to increased regulation, it is not inherently dangerous and, in fact, at least insofar as it constitutes self-representation, it has been found constitutionally protected. See *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972) (first amendment right to petition protects efforts to influence administrative agencies). Moreover, subsection 207(c) does not criminalize all communication with a government agency. The communication becomes illegal only if it is (1) made within a year after departure from government service (2) to one's former agency and (3) concerns a particular matter pending before the agency or in which the agency has a direct and substantial interest.

This case is therefore analogous to *Lambert v. California*, which held that a Los Angeles ordinance requiring convicted felons to register with the city within a certain time period was not a public welfare measure because failure to register upon moving to a new city is "unlike the commission of acts, or the failure to act

under circumstances that should alert the doer to the consequences of his deed." 355 U.S. 225, 228 (1957). In the case at hand, we are dealing with the commission of an act—the act of communicating with a government official with the intent to influence—that in most instances is not only benign, but constitutionally protected. Furthermore, as the doer may not have knowledge of the circumstances that render his acts criminal, one cannot assume that he will be alerted to their consequences.

A frequent justification for public welfare laws is that they cause those subjected to strict liability to exercise extreme caution. *U.S. Gypsum*, 438 U.S. at 441-42, n.17. But again, the conduct with which Nofziger is charged does not fit the pattern that justifies the imposition of strict liability. As the Supreme Court has stated, "where the conduct proscribed is difficult to distinguish from conduct permitted and indeed encouraged . . . the excessive caution spawned by a regime of strict liability will not necessarily redound to the public's benefit." *Id.*

Finally, we are disinclined to treat this statute as a "public welfare" measure without clear evidence of a congressional purpose to impose strict liability because of its potential for chilling speech. If the government's interpretation of subsection 207(c) were correct, a prudent man would avoid even permissible lobbying of his former agency within one year of his departure because the existence of an unsuspected direct and substantial agency interest could convert what he believed to be a permissible communication into a felony. As counsel for the government acknowledged at oral argument, if a former official were to seek his advice on whether he should approach his former agency, "I would inform my client to stay away."

We do not need to decide whether this acknowledged inhibition might have constitutional implications, as suggested by the ACLU in its *amicus* brief, because we conclude that subsection 207(c) is not a public welfare

measure. As we find no evidence that Congress intended to impose strict liability, we must be guided by the rule of lenity and the presumption of *mens rea*. These clearly require that the conviction of Nofziger be set aside because it is not based on a finding that he had knowledge of each element of the offenses charged.

As this conclusion requires reversal, we need not reach Nofziger's other challenges.

III. CONCLUSION

Because of subsection 207(c)'s ambiguity, time-honored rules of statutory construction dictate that we interpret the subsection as requiring the government to demonstrate that Nofziger had knowledge of the facts that made his conduct criminal. The district court should have dismissed the indictment filed by the prosecution because it failed to impose this burden on the government. Accordingly, we reverse the defendant's conviction and remand to the district court for proceedings consistent with this opinion.

So Ordered.

EDWARDS, *Circuit Judge, dissenting*: In construing a criminal act, appellate judges have no license to take "liberties with unequivocal statutory language," nor may we "manufacture ambiguity where none exists." *United States v. Batchelder*, 442 U.S. 114, 121-22 (1979). The majority has labored mightily to find an ambiguity in section 207(c) of the Ethics in Government Act, and then purported to invoke an infrequently-used doctrine that "ambiguities in criminal statutes must be resolved in favor of lenity," *id.* at 121, to overturn the conviction of Franklyn Nofziger. But "there is no ambiguity to resolve," *id.*, and, consequently, no basis for overturning Nofziger's conviction.

Section 207(c) sets forth two criminal offenses, prohibiting former high-ranking government employees from (1) "appearing" before *and* (2) "communicating" with their former agencies, as follows:

Whoever, [being a covered government employee], within one year after such employment has ceased, [1] knowingly acts as agent or attorney for, or otherwise represents, anyone other than the United States in any formal or informal appearance before, *or*, [2] with the intent to influence, makes any oral or written communication on behalf of anyone other than the United States, to—[his former agency concerning a particular matter pending before or of direct and substantial interest to that agency]—[is subject to felony penalties].

18 U.S.C. § 207(c) (1982) (brackets and emphasis added). The language of the statute clearly indicates that "knowingly" is the *mens rea* requirement only for the "appearance offense," while "with the intent to influence" is the *mens rea* requirement for the "communication offense."

During the congressional debates leading to the enactment of the Ethics in Government Act, the Senate and

House versions of section 207(c) were significantly different on the *mens rea* requirement. As stated in the Conference Report, the Senate bill covered

any former official, who "knowingly—(1) makes any appearance or attendance before, or (2) makes any written or oral communication to, and with the intent to influence the action of . . ."

H.R. REP. NO. 1756, 95th Cong., 2d Sess. 74 (1978). The Senate bill thus made "knowingly" the *mens rea* requirement for both offenses. The House bill, on the other hand, set forth "two elements," *id.*, covering a former official who

(a) "knowingly acts as agent or attorney . . . or otherwise represents . . . in any formal or informal appearance before,";

(b) "or, with the intent to influence, make[s] any oral or written communication . . . to . . ."

Id. at 74-75. The House bill thus provided that "knowingly" was the *mens rea* requirement *only* for the appearance offense.

At the conclusion of the congressional debates, "[t]he conference adopted the House prohibition." *Id.* at 75. Thus, the House version of section 207(c) is the one that was enacted into law.

The lack of dispute over the meaning of section 207(c) is highlighted even further in the Conference Report, for it says, in no uncertain terms, that Congress

understood that the two elements of the House language, as set forth above, are each independent of the other for the purposes of a violation of any subsection in which those terms appear.

Id. at 74. There can be no plainer indication of congressional intent.

With only a blithe invocation of the rule of lenity, the majority disregards the clear terms of the statute and ignores the clear expressions of congressional intent. The majority opinion thus enters the dangerous territory of judicial legislating. The doctrine of separation of powers proscribes any judicial rewriting of otherwise valid congressional statutes. The criminal justice process is sufficiently flexible to accommodate "quirks" in the system, through devices such as the exercise of prosecutorial discretion, plea bargaining arrangements, sentencing determinations and, sometimes, even through the questionable means of "jury nullification." But "judicial nullification" is not a permissible way to ameliorate the consequences of a criminal prosecution. Quite simply, judges have "no justification for taking liberties with unequivocal statutory language." *Batchelder*, 442 U.S. at 121-22. In my view, the majority's invocation of the rule of lenity in this case is nothing more than impermissible "judicial nullification."

In order to fully understand the overreach of the majority's decision, one must understand how very rarely the rule of lenity is actually implemented. Indeed, as described by our former colleague, now Justice Scalia, when rejecting application of the rule of lenity to a criminal statute brought by a former congressman in *United States v. Hansen*, 772 F.2d 940 (D.C. Cir. 1985), *cert. denied*, 475 U.S. 1045 (1986), the rule "in truth . . . provides little more than atmospherics, since it leaves open the crucial question—almost invariably present—of how much ambiguousness constitutes . . . ambiguity." 772 F.2d at 948.

Although the rule is a widely accepted theoretical notion, my review of the nearly one hundred federal cases in which reviewing courts in the last ten years have paid lip service to the principle reveals that, almost without exception, courts have found the rule to be altogether *inapplicable* to the facts before them. In the

rare cases in which it has been applied, the rule has most often been used only in its "corollary" function, i.e., to decrease the extent of the punishment attached to a single conviction, rather than to overturn a conviction or an entire statute. See, e.g., *Simpson v. United States*, 435 U.S. 6, 15-16 (1978); *United States v. Grant*, 816 F.2d 440 (9th Cir. 1987). In fact, I could find only three cases in the last decade in which a reviewing court invoked the rule of lenity to overturn a criminal conviction based solely upon a finding that the statute under which a defendant was convicted was too vague or ambiguous to support a conviction.¹ See *Liparota v. United States*, 471 U.S. 419 (1985); *United States v. Capano*, 786 F.2d 122 (3d Cir. 1986); *United States v. Graham Mortgage Corp.*, 740 F.2d 414 (6th Cir. 1984).

I have indulged this brief review of the case law to make a singular point: although no one would deny that the specter of the rule of lenity has had a significant impact on the operation of our democracy, the rule always has been used with the greatest circumspection. Historically, judges have applied it only in the *most egregious cases* of careless legislative drafting, i.e., where a criminal defendant has had no fair notice of proscribed conduct because it is not possible to comprehend the meaning of the criminal statute under which the defendant has been charged. The rule of lenity has been so narrowly applied because, in our system of government, we do not tolerate judicial rewriting of otherwise

¹ Admittedly, the rule sometimes has been invoked as a *but-tressing* argument when an acquittal was deemed appropriate for other reasons. See, e.g., *United States v. McGoff*, 831 F.2d 1071, 1095-96 (D.C. Cir. 1987) (affirming dismissal of criminal charges as time-barred primarily because compelled by the statute of limitations language, and because even if the statute were ambiguous, court would find for criminal defendant); *United States v. Long Cove Seafood, Inc.*, 582 F.2d 159, 166 n.4 (2d Cir. 1978) (affirming acquittal based on clear language of the larceny statute under which defendant was charged).

validly enacted criminal statutes. We recognize that if the rule of lenity is loosely applied, this will result in perhaps the most dangerous form of judicial activism, where "how much ambiguousness constitutes ambiguity" will be a matter of judicial whim.

Because I am unwilling to join the majority intrusion into a sphere properly reserved for Congress, I dissent.

I.

As the Supreme Court has consistently repeated, "the 'touchstone' of the rule of lenity 'is statutory ambiguity.'" *Bifulco v. United States*, 447 U.S. 381, 387 (1980); accord *Lewis v. United States*, 445 U.S. 55, 65 (1980); *Batchelder*, 442 U.S. at 121-22; *Huddleston v. United States*, 415 U.S. 814, 831 (1974). The Court elaborated in *Huddleston* that the rule of lenity

is rooted in the concern of the law for individual rights, and in the belief that fair warning should be accorded as to what conduct is criminal and punishable by deprivation of liberty or property. . . . The rule is also the product of an awareness that legislators and not the courts should define criminal activity. *Zeal in forwarding these laudable policies, however, must not be permitted to shadow the understanding that "[s]ound rules of statutory interpretation exist to discover and not to direct the Congressional will."*

415 U.S. at 831 (emphasis added) (citations omitted). To my mind, the language and structure of section 207 (c) reveal no ambiguity or uncertainty, making the rule of lenity completely irrelevant in this case.

The purported "ambiguity" troubling the majority is mystifying to me, because the basics of grammar and punctuation so clearly teach that the qualifying adverb "knowingly" only modifies the "appearance offense," not the "communication offense," under section 207(c). This

being the case, we must enforce the statute “according to its terms,” *United States v. Ron Pair Enterprises*, 109 S. Ct. 1026, 1030 (1989), and pursuant to the reasonable interpretation “mandated by [its] grammatical structure.” *Id.*

The *Ron Pair* Court found that the setting aside of one statutory clause by commas resulted in that phrase “stand[ing] independent[ly] of the language that follows.” *Id.* at 1031. A similar analysis is appropriate in the case before us. From a purely grammatical perspective, the comma that follows “appearance before” is a “stop,” which ends the first of the enumerated offenses; the comma following “United States” signals the end of the second offense. This choice of punctuation serves to create two independent clauses, each, consistent with the demands of parallel construction, incorporating its own adverbial “intent” modifier: “knowingly” is the adverbial modifier of the “appearance offense” and “with intent to influence” is the adverbial modifier of the “communication offense.” As the trial court properly found, in any ordinary reading of such a sentence, “knowingly” does not modify “with intent to influence”; to read otherwise would ignore or distort the statute’s punctuation.

The statute includes *two* intent modifiers for *two* offenses. An ordinary reading affiliates one modifier with one offense, not two modifiers with one offense and one with the other offense. If the latter were intended, additional punctuation would be required. For example, another “stop”—*e.g.*, a colon or dash—after “knowingly” would indicate that the adverb was intended to modify everything that came after it, instead of only the clause ending before “or.” That is, section 207(c) could have been written so as to penalize any covered former employee

who within one year after such employment has ceased, knowingly—

acts as agent or attorney for, or, with the intent to influence, makes any oral or written com-

munication on behalf of anyone other than the United States, to—[his former agency concerning a particular matter pending before or of direct and substantial interest to that agency].

If the statute were written in this way, the punctuation would make clear that the natural parallelism was to be ignored, and that “knowingly” was to modify both offenses. As it is written, however, the reverse is true.

The appellant’s suggestion that there are *numerous* plausible interpretations of the statute reflects nothing more than a failed attempt at cute advocacy; the simple truth is that the appellant’s arguments regarding the meaning of section 207(c) make no sense whatsoever on the facts of this case. Indeed, Nofziger is unable to offer any positive explanation for why his reading of the statute—applying the “knowingly” requirement to the communications offense—is plausible grammatically. Nofziger seems to believe that the mere assertion of ambiguity is sufficient, without support, to call into question an otherwise clear statute. *See, e.g.,* Reply Brief at 5. Such a suggestion is nonsense.

Because the statute naturally reads to rule out applying “knowingly” to anything but the appearance offense, the appellant must offer concrete, plausible reasons for his charge of ambiguity. Under Nofziger’s approach, parties could always conjure up ambiguity through grammatical contortion. It is difficult to imagine how any statute, criminal or otherwise, could ever withstand judicial scrutiny if courts were to disregard clear mandates of language and to belabor alternative “hidden” meanings.

Thus, in cases in which the rule of lenity has been properly invoked, the lack of clarity in the statute has been striking—unlike in section 207(c). For example, in *Liparota*, on which the majority relies, the statute at issue, 7 U.S.C. § 2024(b)(1), read, “whoever knowingly

uses, transfers, acquires, alters or possesses [food stamps] in any manner not authorized" was subject to fine and imprisonment. In *Liparota*, there was no additional modifying requirement (such as the "with intent to influence" requirement of section 207(c)) attached to any other of the enumerated violations to indicate different *mens rea* requirements for different violations. Because of this, the Court struggled at length with the exact mental state required, ultimately deciding to apply the rule of lenity because

Congress has not explicitly spelled out the mental state required. Although Congress certainly intended by use of the word "knowingly" to require *some* mental state with respect to *some* element of the crime defined in § 2024(b)(1), the interpretations proffered by both parties accord with congressional intent to this extent. Beyond this, the words themselves provide little guidance. *Either interpretation would accord with ordinary usage.*

471 U.S. at 424 (last emphasis added).

It is only after this express finding in *Liparota* that both interpretations comported with "ordinary" usage that the Court could find ambiguity, and thus invoke the rule of lenity. The majority can make no such finding for section 207(c). Indeed, the clarity of section 207(c) is highlighted by contrast to an example of an ambiguous statute cited in *Liparota*:

What, for instance, does "knowingly" modify in a sentence from a "blue sky" law criminal statute punishing one who "knowingly sells a security without a permit" from the securities commissioner? To be guilty must the seller of a security without a permit know only that what he is doing constitutes a sale, or must he also know that the thing he sells is a security, or must he also know that he has no permit to sell the security he sells? As a matter of

grammar the statute is ambiguous; it is not at all clear how far down the sentence the word “knowingly” is intended to travel—whether it modifies “sells,” or “sells a security,” or “sells a security without a permit.” W. LaFave & A. Scott, *Criminal Law* § 27 (1972).

471 U.S. at 424 n.7. Section 207(c) simply does not present such a situation. The similarity between the two statutes ends with the “knowingly” adverbial modifier, because the grammar, punctuation and construction of section 207(c) are fundamentally different. As with the statute in *Liparota*, the hypothetical blue sky law includes no additional adverbial qualifier *besides* knowingly. In order for there to be *any mens rea* requirement for “sells” or “sells a security” or “sells a security without a permit,” “*knowingly*” *must be* that qualifier. The point of ambiguity in the hypothetical turns on whether Congress intended *any* modifier at all to attach—not, as in the case before us, whether *one* modifier applied to *both* offenses while *another* modifier applied to only one.

In order to avoid judicial legislating—or, worse, the potential judicial mayhem that would accompany reading ambiguity into every statute—the Supreme Court has consistently deferred to the “natural” reading compelled by a statute’s punctuation. In *United States v. Yermian*, 468 U.S. 63 (1984), for example, the Court held that the “knowingly and willfully” requirement of a statute² did not modify its jurisdictional requirement, because “[a]ny natural reading of § 1001 . . . establishes that the terms ‘knowingly and willfully’ modify only the making of ‘false, fictitious or fraudulent statements,’ and not

² The relevant language of 18 U.S.C. § 1001 provided,

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully . . . makes any false, fictitious or fraudulent statements or representations, . . . shall be fined . . .

the . . . jurisdiction of a federal agency.” *Id.* at 69 (emphasis added). Moreover, in a footnote addressing section 1001’s predecessor, the Court again stated that the original statute’s “most natural reading” buttressed the Court’s decision. *Id.* at 69 n.6. The Court also explained that the jurisdictional element of the *Yermian* statute appeared “in a phrase separate from the prohibited conduct modified by the terms ‘knowingly and willfully,’ ” *id.* at 69, much like the “knowingly” requirement of section 207(c) appears here “in a phrase separate from” the communication offense.

In short, when statutes facially admit of no ambiguity, courts have construed them “naturally” without extensive elaboration. For example, the way that the Court in *Yermian* justified its reading of the disputed statute is illustrative: the Court simply delineated the relevant grammar and punctuation without explanation. Thus, Nofziger’s attack of the District Court’s attempt to give the words of the statute their “ordinary meaning,” because of the court’s failure to explain “ordinary,” Brief for Appellant at 15, is patently disingenuous. When the language of a statute impels a particular reading, courts have not felt the need to explain obvious meanings. Although I have gone into detail with respect to the meaning of section 207(c), it has been to address the *majority’s* perceived ambiguity, not my own.

II.

If there were the slightest doubt about the statute’s plain meaning, it would be resolved by a review of the legislative history. As I have already shown, the House version of section 207(c) clearly provided that “knowingly” was the *mens rea* requirement *only* for the “appearance offense.” It is undisputed that the Conference Committee adopted the House version of section 207(c), and that this was the version that was enacted into law.

It is also true, as the majority notes, that the Conference Committee adopted the House version of section 207(c) in part to make clear that the subject matter of communication must be of "direct and substantial interest" to the contacted agency in order to fall within the compass of the statute. H.R. REP. NO. 1756, 95th Cong., 2d Sess. 75 (1978). But this fact has no bearing whatsoever on the issue at hand. The Committee could have adopted both the House addition on "direct and substantial interest" and the Senate language on "knowingly." It chose not to do so and we cannot rewrite the language that was enacted. The simple fact is that the language of section 207(c) clearly indicates that "knowingly" is the *mens rea* requirement only for the "appearance of offense," while "with the intent to influence" is the *mens rea* requirement for the "communication offense."

Given this clear congressional mandate, the majority's prominent references to the Carter "Administration draft" of section 207(c) are quite surprising. See, e.g., Majority Opinion ("Maj. Op.") at 2-3, 14-15. The legislative proposal that President Carter sent to Congress is not the one that was enacted into law. Indeed, the Carter proposal mirrored the Senate version of section 207(c), and this is the version that was expressly rejected in conference. Since President Carter's proposal was rejected by Congress, I cannot fathom what point the majority seeks to make in its invocation.

III.

Finally, I am constrained to comment on the majority's characterization of the question here as one of whether "Congress has manifested an unambiguous intent to impose strict liability for the communication offense by limiting the reach of 'knowingly' to the appearance of offense." Maj. Op. at 9. This statement evidences a fundamental misunderstanding of the implications of a finding that the statute is facially clear. To say that "know-

ingly" applies only to the appearance offense does *not* superimpose a strict liability requirement onto the communication offense.

The overarching purpose of the enactment of section 207(c) was to combat the "revolving-door" syndrome, in which senior government officials become lobbyists who seek to influence their former colleagues and agencies on the strength of personal political clout rather than on the merits of the issue before the agency. Therefore, Congress saw a need to attach a "knowingly" *mens rea* requirement to the appearance offense: it sought to avoid creating culpability under an *implied* agency relationship for this offense. This concern is not relevant for the communication offense, which incorporates its own *mens rea* requirement—that of "with intent to influence."³ By enacting the statute thus, Congress avoided imposing strict liability in a criminal context while simultaneously fashioning a more appropriate intent standard for the unique nature of the communication offense.

CONCLUSION

Simply put, there is only one way to read section 207(c). The majority's attempt to suggest otherwise, as I have elaborated, amounts to little more than "judicial nullification" of a clear congressional enactment. If section 207(c) is ambiguous, I cannot imagine what language courts would read as facially clear. The point made in the *Hansen* case by our former colleague, now Justice Scalia, is perfectly apt here: Franklyn Nofziger "has

³ Of course, "intending to influence" and "*knowingly* intending to influence" are different standards, and the former is probably easier to prove in court. Thus, to the extent that the trial court suggested that these two phrases, in practice, represented the same standard, it was in error. However, the fact remains that the trial court correctly applied the "intent to influence" standard—a standard which, despite Nofziger's claims, creates a sufficient *mens rea* requirement so as not to offend our notions of justice.

not . . . been surprised by a novel or unexpected interpretation of the law." 772 F.2d at 949 (citing *United States v. Mallas*, 762 F.2d 361, 363 (4th Cir. 1985)). Accordingly, I cannot comprehend my colleagues' convoluted attempts to embrace the appellant's fancied ambiguity, and their concomitant willingness to ignore clear legislative history and engage in overt legislating. Thus, I respectfully dissent.⁴

⁴ I find no merit in appellant's or amicus' seemingly half-hearted claims that there is insufficient evidence in the record to support a conviction, or that the Ethics in Government Act may be constitutionally infirm. In my view, these claims border on frivolous.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Case No. 87-0309

UNITED STATES OF AMERICA

v.

FRANKLYN C. NOFZIGER
MARK A. BRAGG

[Filed Nov. 10, 1987]

MEMORANDUM OPINION

Defendant Franklyn C. Nofziger, former Assistant to the President for Political Affairs, has been charged in six counts with violating the Ethics in Government Act, specifically 18 U.S.C. § 207. Defendant Mark A. Bragg, a business partner of Mr. Nofziger, has been charged in Count IV with aiding and abetting Nofziger's allegedly criminal act. Defendants have filed a series of pretrial motions challenging the indictment and seeking other pretrial relief.

A number of these motions apply to both defendants, including a motion for an evidentiary hearing on potential conflicts of interest of Independent Counsel, and motions to dismiss on various grounds: a) that the indictment fails to allege the required element of specific intent, b) that § 207 is unconstitutionally vague, c) that the appointment of Independent Counsel violates the Separation

of Powers doctrine, d) that the appointment of Independent Counsel by the Special Court and by the Attorney General each violate provisions of the Ethics Act, and e) that Independent Counsel has exceeded his prosecutorial jurisdiction.

Defendant Nofziger has filed one motion that applies to him alone: a motion to allow Independent Counsel to charge only one of Counts I-IV, on grounds of multiplicity. Defendant Bragg also has filed a number of motions that apply to him only: a motion to strike surplusage from the indictment, a motion for severance, a motion to dismiss on the grounds that the aiding or abetting statute does not apply to § 207 violations, and a motion to dismiss for failure to present exculpatory evidence to the grand jury. These motions will be discussed in turn, largely in the order in which they were presented to the court.

I. MOTION TO STRIKE SURPLUSAGE

Defendant Bragg has moved, pursuant to Federal Rule of Criminal Procedure 7(d), to strike from the indictment as surplusage all references to him in Count I and as incorporated by reference into Counts II, III, V and VI. A motion to strike surplusage will be granted "only where it is clear that the allegations are not relevant to the crime charged and are inflammatory and prejudicial." *United States v. Napolitano*, 552 F.Supp. 465, 480 (S.D.N.Y. 1982).

Defendant Bragg objects because he is charged only in Count IV, yet the indictment contains references to him in Count I which are incorporated by reference into each of the other counts. The references at issue describe defendant Bragg's relationship to defendant Nofziger, Nofziger-Bragg Communications, and the Welbilt Electronic Die Corporation's interest in certain engine contracts with the Army. This description clearly is relevant

to the charges against both Bragg and Nofziger, as they establish the business context for the acts on which the charges are based.

These references, moreover, do not appear to be either inflammatory or prejudicial. They contain no unduly evocative or inciting language and are incorporated into Counts II, III, V and VI only by reference. Their incorporation in these counts, which charge only Nofziger, poses little risk of confusing the jury as to the charges against Bragg. These circumstances clearly do not meet the "exacting standards" required to strike alleged surplusage from an indictment. *See id.*; *United States v. Jordan*, 626 F.2d 928, 930 n.1 (D.C. Cir. 1980). The motion is denied.

II. MOTION FOR SEVERANCE

Defendant Bragg has filed a motion for severance from his co-defendant Nofziger, pursuant to rule 14 of the Federal Rules of Criminal Procedure. In deciding this motion the court must weigh the defendant's interests in a separate trial against the "strong interests favoring joint trial." These interests are primarily those of judicial economy—"to conserve the time of courts, prosecutors, witnesses, and jurors." *United States v. Mardian*, 546 F.2d 973, 979 (D.C. Cir. 1976).

Bragg contends that because of the greater focus on Nofziger in this case, proof against defendant Nofziger will "rub off" on him. He cites the indictment's six counts against Mr. Nofziger compared to one count against him, and notes that he is charged with aiding or abetting and not a violation of the substantive statute. Bragg also expresses concern about the considerable publicity this case has received, nearly all of which has centered on Nofziger. He argues that the jury will be unable to keep the case against defendant Nofziger from tainting his case, despite its different elements and proof requirements.

The court is conscious of its duty to avoid any potential prejudice to a defendant's right to a fair trial. However, the risk suggested by the facts of this case does not rise to that level. There are only two defendants here. Only two substantive criminal laws are implicated. The court has full faith in the jury's ability to weigh fairly the charges and evidence against each individual defendant.

The possibility that the defendant would stand a better chance of acquittal if tried separately, even if accepted as true, does not entitle him to a severance. *United States v. Hurt*, 476 F.2d 1164, 1169 (D.C. Cir. 1973) (citations omitted). Defendant Bragg has shown no more than this, and certainly not the substantial risk of jury confusion or other prejudice required to justify a severance.

III. MOTION FOR EVIDENTIARY HEARING ON CONFLICTS OF INTEREST

Defendant Nofziger, joined by defendant Bragg, has filed a motion for an evidentiary hearing to determine whether the Independent Counsel or any member of his staff is subject to a conflict of interest sufficient to merit disqualification, or the dismissal of the indictment. The potential for conflict is present, defendants allege, because several law firms with which Independent Counsel McKay and other members of his staff are affiliated have represented Fairchild Industries on various matters. Fairchild Industries is also involved in this case, although not as a party. Count VI of the indictment is based on an alleged communication on behalf of Fairchild from Nofziger to staff members of the National Security Council regarding the A-10 aircraft.

The law firms' representations, defendants suggest, pose potential violations of Canon 4 and Canon 9 of the American Bar Association (ABA) Code of Professional Responsibility, and of Standard 3-1.2 of the ABA Standards for Criminal Justice. Canon 4, and the disciplinary rules under it, proscribe a lawyer from (1) revealing a confidence or secret of a client; (2) using a confidence or

secret to a client's disadvantage; and (3) using a confidence or secret for his own or another's advantage without the client's informed consent. Canon 9 and Standard 3-1.2 admonish lawyers to avoid even the appearance of professional impropriety.

Independent Counsel has filed under seal documents describing the scope of the various firms' representations on behalf of Fairchild. Having reviewed these documents, the court finds no evidence of any conflict of interest, nor even the appearance of a conflict, in this case. The matters on which these law firms represented Fairchild are unrelated to the A-10 aircraft and the activities underlying the indictment here. Neither the Independent Counsel nor any member of his staff participated in these representations. Under these circumstances, there is no reason to believe that either the Independent Counsel or any member of his staff was privy to any confidences or secrets of Fairchild, or of the defendants, that is relevant to this case. Nor is any appearance of impropriety suggested by these routine, unrelated and discrete representations. The motion for an evidentiary hearing is denied.

IV. MULTIPLICITY

Defendant Nofziger has filed a motion to require Independent Counsel to choose one count among Counts I-IV and dismiss the rest because they are multiplicitious. He relies on two basic arguments: (1) that the communications alleged to violate 18 U.S.C. § 207(a) in Counts II and III, and the communications alleged to violate 18 U.S.C. § 207(c) in Counts I and II, are part of a single course of action which Congress intended to be subject to one unit of prosecution only, of either statutory section; and (2) that the four communications constitute a single "course of conduct" which must be charged singly under the more "narrowly tailored" section 207(a), rather than as separate violations of sections 207(a) and 207(c).

A summary description of the relevant statutory provisions and the first four counts of the indictment follows:

§ 207(a) prohibits a former federal official from communicating with a government agency intending to influence it regarding a matter with which he had been personally and substantially involved while in the government.

§ 207(c) prohibits a covered former federal official, within the first year after leaving the government, from communicating with his former agency with an intent to influence it on an agency matter.

(Defendant Nofziger left his government position in the Executive Office of the White House in January of 1982.)

Count One alleges defendant Nofziger made a written communication to Edwin Meese, III, then Counselor to the President, on April 8, 1982, in violation of § 207(c).

Count Four alleges defendant Nofziger made a written communication to James Jenkins, then Deputy Counselor to the President on May 27, 1982, in violation of § 207(c).

Count Two alleges defendant Nofziger made an oral communication to John Marsh, Jr., Secretary of the Army, on March 29, 1982, in violation of § 207(a).

Count Three alleges defendant Nofziger made an oral communication to James C. Sanders, Administrator of the Small Business Administration (SBA) on May 3, 1982, in violation of § 207(a).

A. *The Unit of Prosecution*

Defendant Nofziger argues that multiple contacts on behalf of the same client on the same matter constitute a single "communication," and so can result in only a

single violation of 18 U.S.C. § 207(a) and (c). Consequently, Nofziger contends, the indictment's two counts under each statutory provision are multiplicitous and Independent Counsel must choose among them.

To resolve the question of what "unit of prosecution" was intended by Congress, the court must first look to the language of the statute. *United States v. Kimberlin*, 781 F.2d 1247, 1253 (7th Cir. 1985), *cert. denied*, 107 S.Ct. 419 (1986). The relevant portions of § 207 reveal its structure:

§ 207. . . .

(a) Whoever . . . *makes any oral or written communication* on behalf of any person [to] . . . any [government] department [or] agency . . . in connection with [an agency related matter] . . . in which he participated personally and substantially as [a government] officer . . . ; or

. . .

(c) Whoever . . . within one year after [covered government] employment has ceased, . . . with the intent to influence, *makes any oral or written communication* on behalf of anyone other than the United States, to [] the department or agency in which he served [about an agency related matter] . . . ,

. . .

Shall be fined not more than \$10,000 or imprisoned for not more than two years, or both.

18 U.S.C. § 207 (emphasis added).

The plain language of the statute indicates that the unit of prosecution is "any oral or written communication." Defendant Nofziger contends that the term "communication" encompasses multiple, related contacts, with different parties, so long as they are made on behalf of the same client and on the same matter. These contacts are subject to a single unit of prosecution, defendant explains, because they constitute a single course of conduct.

As support for this broad reading of "communication," defendant Nofziger notes a later provision, 18 U.S.C. § 207(d)(2)(B), in which both the words "communication" and "communications" are used in reference to section 207(c). This usage, however, does not imply the conclusion defendant draws from it.

Defendant Nofziger also notes that other cases and authorities have recognized situations in which multiple individual acts constitute a single course of conduct, which is then treated as the appropriate unit of prosecution. Defendant's analogy would be most persuasive to the court if it were limited to communication between two parties. Individual episodes of "communication" between two parties can sometimes reasonably be viewed as part of a single course of communication about a subject. This argument, however, loses its force when extended to contacts with different parties. The idea that a "communication" begun between two parties may continue when one of them later contacts a third party bends the ordinary meaning of the word past its breaking point. Cf. *Blockburger v. United States*, 284 U.S. 299, 302, 52 S.Ct. 180, 181 (1932) (test of "course of action" concept is whether individual acts are prohibited or the course of action they constitute).

Defendant Nofziger maintains that the statutory language is at least ambiguous, and so the court must consult the legislative history. See *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221, 73 S.Ct. 227, 229 (1952). If the legislative history does not resolve the uncertainty, the defendant asserts, the rule of lenity would require a construction that minimizes the number of counts chargeable. *Id.* at 221-22, 73 S.Ct. at 229. Although the court finds the statute sufficiently clear to reveal Congress' intent, defendant's arguments will be considered briefly.

Defendant argues that because Congress intended to regulate the general business or practice of lobbying, it

therefore did not seek to penalize individually each letter or conversation of a former official with a current member of the government. The court finds no basis in experience or the legislative history for this sweeping conclusion, and notes that taken to its logical extreme, this reasoning suggests that all of defendant Nofziger's contacts on behalf of all of his clients could be treated only as a single violation of the statute.

Defendant Nofziger argues further that even if the statutory language and legislative history do not demonstrate Congress' intent that prosecution be limited to each "course of conduct," as they have defined it here, ambiguity remains and must be resolved in favor of leniency. *See Bell v. United States*, 349 U.S. 81, 83, 75 S.Ct. 620, 621 (1955). If the court was in substantial doubt as to Congress' intent here, defendant's argument would be persuasive. The statute's own language speaks clearly enough, however, that there is no need to refer to such general policy consideration.

B. Prosecution Under Both § 207(a) and § 207(c)

Defendant Nofziger has made a second series of arguments which rely on his contention that the actions alleged in Counts I-IV constitute a single course of conduct. These assertions must fail in light of the court's holding that each contact with a different party constitutes a chargeable violation. For the purpose of evaluating these arguments, however, the court will posit acceptance of defendant's views on this underlying issue.

On the assumption that the acts underlying Counts I-IV constitute a single course of conduct, defendant challenges the indictment for alleging the violation of two statutory provisions by a single "act." Whether Congress intended multiple punishments to be imposed for a single offense is generally determined by application of the *Blockburger* test. *United States v. Blockburger*, 284 U.S. 299, 52 S.Ct. 180 (1932). The Supreme Court in *Block-*

burger stated that whether an act can be charged under two provisions or only one depends upon "whether each provision requires proof of an additional fact which the other does not." *Id.* at 304, 52 S.Ct. at 182.

The statutory provisions here clearly meet this test. Unlike § 207(a), § 207(c) requires that the defendant be a "covered" employee under subsection (d), that he have left that employment within the last year, and that his communication be to his former agency. Section 207 (a) requires none of these elements, but unlike § 207(c), requires that the defendant have contacted the agency about a matter in which he had personally and substantially participated while a government official. The differing requirements of these sections is illustrated by the fact that the acts charged in Counts I and IV as violating § 207(a) could not have been charged under § 207(c) because the contacts were not made to defendant's former agency.

Opposing this conclusion, defendant Nofziger rightly states that the *Blockburger* test, which serves as a proxy for more explicit statements of congressional intent, should not be applied in the face of clear indications of contrary legislative intent. See *Albernaz v. United States*, 450 U.S. 333, 340, 101 S.Ct. 1137, 1143 (1981). Defendant has failed, however, to show such contrary intent. Instead, defendant has argued that the acts charged under § 207(a) and (c) do not trigger the specific reasons he asserts were behind Congress' enactment of these discrete subsections. On the basis of this observation, defendant concludes Congress must not have meant for these acts to be prosecuted under both subsections. The conclusion simply does not follow. Its thrust, moreover, is contrary to a basic notion inherent in *Blockburger*, that a single act can violate two statutes so long as the statutes (not the underlying facts) involve different elements.

In support of his view of Congress' intent, defendant Nofziger suggests that Congress acted in reliance on the judicially created rule that in some contexts, where two statutes have been violated, a prosecutor must charge a defendant with the more specifically tailored crime. This argument offers little support for defendant's theory. The rule Nofziger cites has a limited application, as is suggested by the contrary rule embodied in the *Blockburger* case. Moreover, it does not suggest the conclusion defendants would reach in this case.

Although it is true that the contacts charged as violations of § 207(c) could have been charged as violations of § 207(a), it is not at all clear that § 207(a) is more narrowly tailored than § 207(c). Section 207(c) is applicable for a shorter period of time, affecting officials only for the one year after they leave office. Subsection (c) also applies to fewer officials, as only those who meet the salary level and other requirements set in subsection (d) are covered. Section 207(a) on the other hand, requires primarily that the subject of the communication be one in which the former official had participated personally and substantially while in government. Considering their specifications, these provisions seem better characterized as separate statutory crimes aimed at discrete but related conduct. The court does not find Independent Counsel to have exceeded his prosecutorial discretion in charging two counts under § 207(a) and two counts under § 207(c).

Defendant Nofziger contends that the fact that these provisions are subsections of the same act and part of a coordinated statutory scheme suggests a probability that Congress did not intend for both of them to be prosecuted as violated by the same acts. See *Irby v. United States*, 250 F.Supp. 983, 986 (D.D.C. 1965), *aff'd*, 390 F.2d 432 (D.C. Cir. 1967). Defendant's position would be more persuasive if these violations *were* based on the same acts but they are not. Even if defendant's

course of conduct argument were accepted in principle, however, factual differences in the four relevant contacts trigger different elements in the statutory crimes charged. Counts I and IV are based on alleged communications to the White House, Nofziger's former agency, and so violate § 207(c). Counts II and III are based on alleged communications to the Army and the SBA, concerning a matter Nofziger had been personally involved with, and so violate § 207(a). Defendant's case for considering these acts as a single course of conduct is undercut by the statute's recognition of these elements as meriting separate statutory provisions.

The rule of lenity will not help defendant here, as the court perceives no ambiguity in the statute's intent to punish individually each communication violating either § 207(a) or § 207(c), or both.

C. Conclusion

The court finds each of defendant's four alleged contacts to constitute a separate "communication" within the meaning of § 207(a) and (c) which may be individually prosecuted. The court also finds the prosecution of two counts under § 207(a) and two counts under § 207(c) to be proper. Defendant's motion is denied.

V. AIDING OR ABETTING

Defendant Bragg has filed a motion to dismiss, in part based on the ground that the aiding or abetting statute, 18 U.S.C. § 2, does not apply to the substantive criminal statute at issue here, 18 U.S.C. § 207. Bragg's two other grounds for dismissal are discussed below, at sections VI. on Intent and VII. on Vagueness, together with defendant Nofziger's argument on those issues. Section 2 makes those who aid or abet the commission of a federal crime liable as a principal. *Standefer v. United States*, 447 U.S. 10, 18-19, 100 S.Ct. 1999, 2005 (1980). Defendant's assertion that § 2 is inapplicable here conflicts with

the plain language of § 2. Moreover, the legislative history of § 207, as well as relevant case law, does not support an exception to its application here.

Section 2 reads as follows:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 2.

By its own terms, § 2 applies to all federal crimes. *United States v. Jones*, 678 F.2d 102, 105 (9th Cir. 1982). In searching to demonstrate a legislative intent to exempt § 207 from its application, defendant Bragg points to § 207(g). Subsection (g) prohibits the partner of a current government official from representing other parties before the government on matters in which that official has had responsibility or been substantially involved. Defendant Bragg argues that the fact Congress explicitly made *these* acts, by persons other than government officials, subject to criminal prosecution implies that Congress did not intend for such non-government persons to be liable for other violations of the act. The court, however, finds defendant Bragg's evidence far too weak to support the suggested inference.

Defendant Bragg also cites to subsection (j) which allows an agency head to take administrative action against a former government official who the agency head finds to have violated subsections (a), (b), or (c). He notes that administrative sanctions are considered appropriate where a perceived violation is not so egregious or clear-cut as to call for criminal prosecution. Bragg argues that the fact that former government offi-

cialists who are considered to have violated the statute may be subject only to administrative sanctions illustrates the inappropriateness of criminal prosecutions against persons who never served in the government. Whether criminal sanctions are authorized here is a question of what Congress intended, not what this court would have done in its place. Defendant's "evidence" that Congress intended to exempt § 207 violations from aiding or abetting charges is insufficient to contradict the plain meaning and ordinary operation of § 2.

Defendant Bragg next seeks to show that criminal prosecution of aiders or abettors will disrupt the balance struck by Congress in this statute between preventing ethics conflicts and protecting recruitment of government officials. There is no evidence, however, that the balance struck did not *include* the prohibition against aiding or abetting, incorporated through § 2, of which Congress was well aware. In the absence of evidence to the contrary, the court must assume that Congress understood the clear import of its enactments.

Finally, defendant argues that the reasoning of *United States v. Nasser*, 476 F.2d 1111 (7th Cir. 1973), should prevent prosecution of the aiding or abetting charge in this case. The court in *Nasser* held that 18 U.S.C. § 207 (a) barred a separate conspiracy charge against the client of the accused former government official. *Nasser*, however, is not applicable to this case.

The *Nasser* decision turned on the court's construction of Congress' intent. 476 F.2d at 1119. Because a former government official will always require the cooperation of a client in order to violate § 207, the court inferred that Congress' failure to explicitly incorporate conspiracy penalties against the client meant that Congress intended that the client not be subject to such charges. The facts of the case at bar do not parallel those in *Nasser*. Because defendant Nofziger did not require the assistance or inducement of defendant Bragg

in order to violate § 207(a), no inference can be drawn from the absence of any provision addressing the liability of aiders or abettors. Even if it applied, moreover, the *Nasser* rationale was rejected by the District of Columbia Circuit in *May v. United States*, 175 F.2d 994, 1004 (D.C. Cir. 1949) (upholding separate charge of aiding or abetting), *cert. denied*, 338 U.S. 830, 70 S.Ct. 58 (1949).

It is notable that in appointing Independent Counsel here, the Division for the Appointment of Independent Counsels of the Court of Appeals for the District of Columbia ("Special Court") apparently believed that § 2 applied to § 207 violations, as it explicitly authorized the investigation and prosecution of any person or entity involved in the Welbilt matter, including persons "who have aided or abetted any criminal offense related to the prosecutorial jurisdiction of the Independent Counsel." *In re Nofziger*, No. 87-1 at 2-3 (D.C. Cir. Division for Appointing Independent Counsels Feb. 2, 1987).

Defendant Bragg has not presented sufficient reason for excepting 18 U.S.C. § 207 from the general application of the aiding or abetting statute, 18 U.S.C. § 2. Defendant's motion to dismiss, as based on the asserted inapplicability of § 2 to this case, is denied.

VI. INTENT

Defendants Nofziger and Bragg each seek to have the indictment dismissed for failing to allege the element of specific intent they contend the statute requires. Whether § 207 requires a showing of an intent to violate the law, or "guilty knowledge," as defendants contend, is a question of legislative intent. *See Liparota v. United States*, 471 U.S. 419, 423-24, 105 S.Ct. 2084, 2087 (1985) (Congress defines elements of federal crimes).

Basic principles of our criminal law have traditionally required the prosecutor to prove a defendant possessed a culpable mental state when committing the crime charged.

If the statutory codification of a common-law crime did not specify a particular mental element, courts would imply one from the statute's common-law origins. Indictments that failed to allege the required mental element of specific intent were subject to dismissal, even though the statute itself made no mention of a mental element. *E.g.*, *Pettibone v. United States*, 148 U.S. 197, 202-10, 13 S.Ct. 545-48 (1893).

In modern times, however, this requirement has been modified for some statutorily created crimes whose elements are not derived from existing common law. *See Morissette v. United States*, 342 U.S. 246, 250-62, 72 S.Ct. 240, 243-49 (1952). At least for some types of what have been called "public welfare" offenses, the Supreme Court has held "if the offense is a statutory one, and intent or knowledge is not made an element of it, the indictment need not charge such knowledge or intent." *United States v. Behrman*, 258 U.S. 280, 288, 42 S.Ct. 303, 304 (1922).

In *United States v. Balint*, announced the same day as *Behrman*, the Supreme Court clarified the concept behind such public welfare statutes. The intent requirement could be dispensed with in these statutes, the Court indicated, because their purpose would be "obstructed" if the prosecutor was required to show that the defendant knew his act was contrary to law. *United States v. Balint*, 258 U.S. 250, 251-52, 42 S.Ct. 301, 302 (1922). Certain regulatory measures, the Court explained, purposefully place responsibility on the defendant to find out the facts upon which his liability may depend. These statutes often seek some general social benefit, rather than the punishment of acts which are evil in themselves. *Id.* at 252, 42 S.Ct. at 302.

Defendants advance the Supreme Court's decision in *Liparota v. United States*, 471 U.S. 419, 105 S.Ct. 2084 (1985), in support of their claim that specific intent is a required element of this case. *Liparota* involved a differ-

ent statutory scheme which regulated the transfer of food stamps. Moreover, the Court in *Liparota* held that the statute in question was not of the "public welfare" type, which "a reasonable person should know is subject to stringent regulation." *Id.* at 432-33, 105 S.Ct. at 2092. That case is inapposite to a prosecution under § 207. A part of the Ethics in Government Act, § 207 is designed to serve the general public interest in honest government. The statute provides mechanisms to inform government officials and related professionals of its requirements, through the Office of Government Ethics and agency advisors, and reasonably places the burden on those regulated persons to conform their conduct to its requirements.

Upon an analysis of the statutory language and legislative history, the court concludes that 18 U.S.C. § 207 is a "public welfare" measure which places on defendants the burden of ensuring their compliance. The court, then will apply § 207 as written, giving the words of the statute their ordinary meaning.

Defendants argue that the statutory language reveals Congress' intent that specific intent be an element of § 207(a) and (c). They point to the use of the word "knowingly" in the relevant provisions.

§ 207 . . .

(a) Whoever . . . *knowingly* acts as agent or attorney . . . , or, with the intent to influence, makes any oral or written communication on behalf of any other person [to a government agency] . . .

. . .

(c) Whoever . . . *knowingly* acts as agent or attorney . . . , or, with the intent to influence, makes any oral or written communication on behalf of anyone other than the United States [to his former agency]

. . .

. . .

shall be fined . . .

18 U.S.C. § 207 (emphasis added).

Defendants contend that the word “knowingly” modifies the phrase “makes any . . . communication” and everything that follows it in each subsection. Defendants’ reading would require Independent Counsel to prove that defendants knew the facts underlying each element of the offense—in effect, that they knew they were violating the law. The court does not believe this pervasive, super-modifying role can be reconciled with common usage. Nor can the court accept this reading without some clear indication that Congress intended such a less-than-obvious result.

Defendants seek support for their construction of the statute in the paraphrasing of its elements by other governmental entities. Defendants cite the Special Court in its appointment of Independent Counsel McKay, the Attorney General in his referral of related matters to the Independent Counsel’s prosecutorial jurisdiction, the Justice Department in other § 207 indictments, and the Office of Government Ethics in its explanation of the statute’s requirements. In each of these cases, the entity has—at most—paraphrased the statute as requiring that the defendant’s act be “knowing,” whether the relevant act is a representation or a communication. The indictments defendants cite do not even paraphrase to this extent, but merely track the statutory language.

Defendants argue that these paraphrases indicate that the statutory term “knowingly” modifies not only “communications” but each of the remaining elements of the statute, such as § 207(c)’s requirement with regard to Counts I and IV that the White House have had a “direct and substantial interest” in the Welbilt matter. This argument goes too far. Defendants attempt to imply a specific intent requirement solely from the existence of the term “knowingly” in the statute. As professors LaFave and Scott have observed, however, “the word ‘knowledge’ [as denoting the mental element required for conviction] has been taken to mean many different

things—all the way down to mere negligence in not knowing.” W. LaFave & A. Scott, Jr., *Substantive Criminal Law*, § 3.5(b) at 309 (1986) (footnote omitted).

This statute has no common law predecessor from which this court might draw a previously established mental element. In such a case, the court must apply the statute as written by Congress according to the plain and ordinary meaning of its words. This reading requires only that defendants were conscious of their actions; it does not require that they knew these acts to constitute a violation of § 207.

The court understands the use of the term “knowingly”, as used by the Special Court, the Attorney General, the Justice Department, and the Office of Government Ethics, as well as in the statute, according to its simplest common meaning—that is, to indicate the absence of mistake. *Cf. Licavoli v. United States*, 294 F.2d 207, 208-09 (D.C. Cir.) (“wilfull” failure to respond to subpoena means “deliberate intention to do the act”), *cert. denied*, 366 U.S. 936, 81 S.Ct. 1660 (1961). Under this plain reading, it does not matter whether “knowingly” was actually intended by Congress to modify the communication clause as well as the representation clause, as the lack of mistake is inherent in the requirement that the communication be made with the intent to influence.

The interpretation of the government, that the phrase “with the intent to influence” was intended by Congress to indicate the mental element required for a violation of the communication clause, is supported by the legislative history. The Conference Report describes the House version of § 207, which was adopted by the Congress, as having two elements, which were directed against any person who

- (a) “knowingly acts as agent or attorney . . . or otherwise represents . . . in any formal or informal appearance before,”;

(b) "or, with the intent to influence, make any written or oral communication . . . to . . ."

H.R. Rep. No. 95-1756, 95th Cong., 2d Sess. 74 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 4381, 4390. The report went on to note that "[i]t is understood that the two elements of the House language, as set forth above, are each independent of the other for the purposes of a violation of any subsection in which those terms appear." *Id.* Independent Counsel has also represented that its interpretation is consistent with that of the Justice Department, as stated by the Criminal Division's Public Integrity Section.

Defendants argue that the court can read a specific intent requirement into the statute even when one is not present in the language itself. The court declines to do so for several reasons. The prohibition here is not based on a common-law predecessor whose intent requirement should be transplanted. Nor do the purposes of the statute seem consistent with a requirement that prosecutions be based on a showing of guilty knowledge. "18 USC 207 . . . seeks to avoid *even the appearance* of public office being used for personal or private gain." S. Rep. 95-170, 95th Cong., 1st Sess. 32 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 4217, 4248.

Moreover, the Court has recognized that in certain situations, a specific intent requirement can cripple a statute's effectiveness at halting the conduct it prohibits. *See Hamling v. United States*, 418 U.S. 87, 120-21, 94 S.Ct. 2887, 2909 (1974) (citing *Rosen v. United States*, 161 U.S. 29, 41-42, 16 S.Ct. 434, 438 (1896)). The criminal and administrative sanctions available to enforce § 207 were expected to "encourage officials to exercise a higher degree of caution in their subsequent activities as private citizens," according to the Senate Report accompanying the Senate version of the Ethics bill. S. Rep. No. 95-170, 95th Cong., 1st Sess. 31 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 4217,

4247. As the *Hamling* court noted, however, the incidence of the conduct sought to be prohibited might very well increase if the defendant's understanding of the law were the test of his guilt. 418 U.S. at 120-24, 94 S.Ct. at 290-11.

This view of Congress' intent with regard to § 207 is consistent with Congress' exclusion of a specific intent requirement in a similar conflict of interest statute, 18 U.S.C. § 208. Section 208 prohibits a covered government official from participating in most government decisions in which he knows that he, or parties related to him, have a financial interest. Violators of § 208 are subject to the same penalties as violators of § 207. In applying § 208 to an official who claimed he did not think he had a conflict of interest, the Supreme Court stated "the statute establishes an objective, not a subjective, standard, and it is therefore of little moment whether the agent thought he was violating the statute." *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 560-61, 81 S.Ct. 294, 315 (1961). The exclusion of a specific intent requirement from § 207 is a rational means Congress could have chosen, as it did in § 208, to protect the public from the "mistakes" of its officials, as well as their "connivances." Cf. *id.* at 561, 81 S.Ct. at 315.

Fairness does not require a different result. Defendants here were on notice of the requirements of § 207 well before defendant Nofziger left the government. They had the advice of counsel specifically on that issue. The statute is not now to blame if they have failed to conform their conduct to its strictures. The court sees no need to resort to the rule of lenity where defendants had clear and ample notice of the statute's mental and factual elements.

Defendant Bragg poses an additional argument. He contends that independent of the mental intent required by § 207, proof of specific intent is a prerequisite to any

conviction for aiding or abetting, citing *United States v. Raper*, 676 F.2d 841, 849 (D.C. Cir. 1982) ("specific intent" and "guilty knowledge" are elements of aiding or abetting offense). The *Raper* decision, however, involved a substantive offense—possession of heroin with intent to distribute—that requires specific intent. As such, *Raper* does not refute the government's contention that the mental element for an aiding or abetting offense is supplied by the substantive statute involved. See *United States v. Burkhalter*, 583 F.2d 389, 391-92 (8th Cir. 1978); *United States v. Kurka*, 818 F.2d 1427, 1432 (9th Cir. 1987). Moreover, both defendants are professionals, expected to be aware of the regulatory limitations imposed on their business activities, and defendants here were so aware. The court sees no reason why defendant Bragg should be subject to a different standard of mental intent than that to which defendant Nofziger is held. The court finds the indictment to properly state the required degree of intent.

VII. VAGUENESS

Defendants challenge § 207(a) and (c) as unconstitutionally vague, in violation of the due process clause. Both defendants claim the statute is vague on its face. Defendant Bragg also asserts its vagueness as applied to him in this case. These challenges will be discussed in turn.

In reviewing a vagueness challenge, the court will examine whether the statute at issue threatens any one of three values the doctrine seeks to protect. These are (1) providing fair notice to those subject to its penalties, (2) preventing arbitrary or discriminatory enforcement, and (3) avoiding undue inhibition of free speech. *Grayned v. City of Rockford*, 408 U.S. 104, 108, S.Ct. 2294, 2298-99 (1972). The court will scrutinize § 207 in light of its criminal penalties, but with the understanding that regulated persons are responsible for meeting its requirements. See *Village of Hoffman Estates v. Flipside, Hoff-*

man Estates, Inc., 455 U.S. 489, 498-99, 102 S.Ct. 1186, 1193 (1982).

Defendants object to two specific phrases, one of which appears twice in the statute, as being unconstitutionally vague: (1) (a) the "direct and substantial interest" of the United States in the subject matter of the communication at issue in § 207(a); (1) (b) the "direct and substantial interest" of the official's former agency in the subject matter of the communication at issue in § 207(c); and (2) "participated personally and substantially" as referring to the prior involvement of the former official in the specific matter that is the subject of the communication at issue in § 207(c).

Defendants object that the phrase "direct and substantial interest" as used in both § 207(a) and § 207(c) is undefined by statute or regulation and lacks any commonly understood meaning. As a result, defendants contend, they have been able only to guess at its meaning in attempting to meet its mandate, and risk arbitrary and discriminatory prosecution. The court finds to the contrary that these terms have well understood common meanings more than sufficient to put the defendants on notice of their application.

These terms clearly establish the general class of interests in which the statute's prohibitions apply; consequently, they will not be found unconstitutionally vague even though there may be marginal cases to which their application could be uncertain. See *United States v. Harris*, 347 U.S. 612, 618, 74 S.Ct. 808, 812 (1954); *United States v. Petrillo*, 332 U.S. 1, 7, 67 S.Ct. 1538, 1542 (1947). As used in § 207(a), the requirement that there be a "direct and substantial interest" of the United States serves to restrict the statute's prohibitions on lobbying to federal issues—matters that implicate the statute's goal of ensuring public confidence in honest government. See S. Rep. No. 95-170, 95th Cong., 1st Sess. 1 (1977) ("The purpose of this legislation is to preserve and promote the accountability and integrity of public officials and of the

institutions of the Federal Government . . .”), reprinted in 1978 U.S. Code Cong. & Admin. News 4217. Cf. *Kissenich v. Commodity Futures Trading Commission*, 684 F.2d 88, 94-95 & n.7 (D.C. Cir. 1982) (discussing without deciding that United States “may” have direct and substantial interest in disqualifying attorney from representing client before former agency on matter in which he had been involved).

Moreover the facts of this case clearly implicate the general class of interests sought to be protected. Each of the matters underlying the charges in the indictment—an Army engine contract, civilian manning of United States Government ships, and the funding of the Department of Defense for purchases of A-10 antitank aircraft—are issues of federal government operations in which the government must inherently have a “direct and substantial interest.”

In § 207(c), the phrase “direct and substantial interest” of the agency serves to limit the ban on a recent official’s contacts with his former agency to those matters within the agency’s sphere of action—matters which most directly implicate the statute’s purpose in promoting public confidence in government. See S. Rep. No. 170, 95th Cong., 1st Sess. 31 (1977) (“Former officials should not be permitted to exercise undue influence over former colleagues, still in office, in matters pending before their agencies . . .”), reprinted in 1978 U.S. Code Cong. & Admin. News 4217, 4247. Although defendants may contest at trial the indictment’s assertion that a sufficient White House interest was present in the matters at issue, the court finds they had adequate notice that this language was applicable.

Defendants also argue that the meaning of these terms is subjective to the interpreter, and therefore out of their control, subjecting them to an unconstitutional risk of arbitrary and discriminatory enforcement. Defendants cite this circuit’s decision in *Big Mama Rag, Inc. v.*

United States, 631 F.2d 1030, 1035 (D.C. Cir. 1980), in which the court focused on whether the challenged terms were so vague as to be incapable of "objective measurement." Unlike the term "educational" at issue in *Big Mama Rag*, which was found to be unduly subject to Internal Revenue Service interpretation in deciding whether tax-exempt status would be granted, the terms at issue here are capable of measurement under an objective, or "reasonable person" standard. The final determination as to whether the United States or the White House had a "direct and substantial interest" in the matters charged here has not been left to the discretion of Independent Counsel but has passed the scrutiny of a federal grand jury and ultimately will be decided by an impartial jury. These constraints further ensure that the terms can and must be measured by both the prosecutor and defendants according to their objective meaning, which defendants are fully capable of understanding.

Defendants have also claimed harm to their first amendment interests, asserting that the statute's vagueness impinges on the buffer zone protecting free speech rights. Because it is unclear what communications are prohibited, defendants assert, the statute will unconstitutionally chill speech which might conceivably come within its reach. The court finds the terms at issue to be clear enough to avoid undue self-censorship—recognizing that some indirect effect, comparable to that produced by criminal libel laws, must be tolerated. See *United States v. Harriss*, 347 U.S. at 626, 74 S.Ct. at 816.

Defendants have also challenged as unconstitutionally vague the terms "personally and substantially" as they refer to defendant Nofziger's prior participation as a government official in the matters underlying the alleged violations of § 207(a) here. The court finds these terms to have a well understood common meaning, supplemented by regulations promulgated by the Office of Government Ethics, which is within the Office of Personnel Management. See 5 C.F.R. § 737.5(d).

Although § 207 has undergone several revisions of its language, the Court of Appeals for the Eighth Circuit found an earlier version of § 207(a), which contained the relevant phrases here, to be sufficiently understandable. The court concluded that "[t]his statute prescribes perhaps as precisely as possible an unethical practice that can manifest itself in infinite forms." *United States v. Nasser*, 476 F.2d at 1135 (finding § 207 not unconstitutionally vague).

The qualifying terms at issue here serve to limit the general ban of § 207(a) to matters in which the former official may have gained special knowledge on specific matters as a result of his prior involvement, which Congress felt should not be used to unfair advantage against the United States. S. Rep. No. 170, 95th Cong., 1st Sess. 31 (1977) ("Former officials . . . should not be permitted to utilize information on specific cases gained during government service for their own benefit and that of private clients."), reprinted in 1978 U.S. Code Cong. & Admin. News 4217, 4247, Cf. *CACI, Inc.-Federal v. United States*, 719 F.2d 1567, 1575-76 (Fed. Cir. 1983) (section 207(a) not violated by submission to former agency of contract proposal which did not involve "same particular matter" in which former government employee had personally and substantially participated). Certainly defendants here have had adequate notice of the terms' applicability to the work of Mr. Nofziger. In light of additionally regulatory explanations of the terms "personally" and "substantially," 5 C.F.R. 737.5(d), these terms present even less danger of arbitrary and discriminatory enforcement or inhibition of first amendment freedoms than existed with respect to the terms "direct and substantial" discussed above.

In addition to their objection to specific statutory language, defendants advance several other arguments in support of their facial vagueness challenge. Defendants claim that the "exceptions" to the general prohibition on

communications specified in § 207(a) and (c) reveal the subtlety of the distinctions separating what is prohibited from what is not, and exacerbate the statute's vagueness. Defendants' also point to "flip-flopping" interpretations, by the OGE and by the Justice Department in applying different provisions of the statute, as illustrating the statute's vagueness. Finally, defendants put forward the comments of government officials and others, testifying to the problems and subtleties encountered in enforcing the statute, as further evidence of its vagueness.

The court finds defendants' observations in this regard to be of little relevance to the analysis of this case. The problems defendants complain of are not problems of vagueness but matters of public policy, administrative ease and fairness, which are properly addressed to Congress. The "exceptions" defendants cite do not make ambiguous the clear prohibition against communications made with the intent to influence—the conduct with which defendants are charged. Nor do changes in the application of certain provisions demonstrate unconstitutional vagueness.

Defendant Nofziger may complain that had such changes been made earlier, his alleged communication with the National Security Council (NSC) in Count VI could not have violated § 207(c) because it was no longer considered his former agency. At the time of Nofziger's alleged contact, the Executive Office was considered a single agency which included the NSC. A later interpretation of "agency" by the OGE treated the NSC as a separate agency from the White House. This complaint is for Congress, however, not this court. Moreover, defendants can hardly be heard to complain of vagueness where a written statement of the OGE, issued prior to Nofziger's communication with the NSC, clearly indicated that the NSC was considered to be part of the single agency of the Executive Office of the President. *See* Letter from J. Jackson Walter, Director, Office of Govern-

ment Ethics to James A. Baker, III, White House Chief of Staff (date stamped Mar. 31, 1981).

The other change in interpretation concerns the Justice Department's opinion on whether Independent Counsels are subject to the statute's restrictions. This matter is simply of no relevance to the issues presented here. Nor does it demonstrate any vagueness in the statute. Finally, defendants' evidence of the difficulties that have been encountered in administering the statute does not demonstrate that it is vague. Congress has undertaken to regulate an area of vital importance to our increasingly bureaucratized government. The court recognizes, moreover, that this measure addresses difficult policy issues and must operate in a subtle and fluid administrative environment. These facts do not render the statute invalid. The court concludes that the flexible terms Congress has chosen to define the scope of application of § 207 are reasonable and rationally suited to its objective, within the inherent limits of our language. See *Grayned v. City of Rockford*, 408 U.S. at 110, 92 S.Ct. 2300.

Defendant Bragg has argued in addition that the statute is vague as it applies to him. He challenges specifically the phrase "direct and substantial interest" in § 207(c) as it refers to an agency's interest in the subject matter of its former official's communication. Defendant Bragg contends that at the time of the communication, he could not have known that the White House had a "direct and substantial interest" in the Welbilt proposed Army engine contract about which defendant Nofziger is alleged to have communicated with Mr. Jenkins in Count IV.

The statute, however, is no more vague in its application to Mr. Bragg than it is on its face. At the time the communication was made, Mr. Nofziger and Mr. Bragg were partners in the commercial enterprise of lobbying. Such businessmen are expected to be aware of the regu-

lations that govern the practice of their business, including § 207. It is clear, moreover, that the defendants here, including Mr. Bragg, were in fact aware of § 207 and received the advice of counsel on its application. The court finds the statute sufficiently clear both on its face and as applied.

VIII. CONSTITUTIONALITY OF INDEPENDENT COUNSEL'S APPOINTMENT

Defendants have sought to dismiss the indictment on the ground that the statutory provisions authorizing the appointment of Independent Counsel are unconstitutional. In summary, defendants argue that the relevant Ethics Act provisions, 28 U.S.C. § 591 *et seq.*, violate the Separation of Powers doctrine by giving the Judiciary and the Congress too large a role in initiating, monitoring, and terminating the prosecutorial functions of the Independent Counsel.

This issue has been addressed several times recently by the District Court and Circuit Court of Appeals of the District of Columbia. Although none of these decisions is technically binding on this court, due to differences in facts and procedural posture, each is persuasive authority that must be considered thoroughly.

The court of appeals of this circuit recently found the Attorney General's parallel appointment of Independent Counsel Walsh to be valid and adequate to support his investigation and prosecution of Lt. Col. North, upholding the district court's decision in *In re Sealed Case*, Misc. No. 87-0139 (D.D.C. July 10, 1987). *In re Sealed Case*, No. 87-5247, slip op. at 11-16, 22-23, 30 (D.C. Cir. Aug. 20, 1987). The parallel appointment by the Attorney General obviated the need for the court to evaluate *vel non* the constitutionality of Walsh's appointment under the Ethics Act. *Id.* at 22-23, 30.

Although that *Sealed Case* decision concerned a pre-indictment claim, the fact that defendants here present

their challenge on pretrial motion does not weaken the logical or doctrinal basis of the court of appeals decision. As the circuit court stated, it is a “‘well-established principle . . . that normally [a c]ourt will not decide a constitutional question if there is some other ground upon which to dispose of the case.’” *Id.* at 10 (quoting *Escambia County v. McMillan*, 466 U.S. 48, 51, 104 S.Ct. 1577, 1579 (1984)). That ground is the same here as in the case before the court of appeals—the Attorney General’s appointment of Independent Counsel under the authority of 5 U.S.C. § 301 and 28 U.S.C. §§ 509, 510 & 515. Compare 52 Fed. Reg. 7270, 7270-73 (to be codified at 28 C.F.R. Parts 600 & 601) (Walsh appointment) with 52 Fed. Reg. 22438, 22438-39 (to be codified at 28 C.F.R. Part 602) (McKay appointment).

The court of appeals found the Attorney General’s delegation to an Independent Counsel to be authorized by the Constitution, by statute, and by regulation. *In re Sealed Case*, No. 87-5247, slip op. at 11-12, 22. This conclusion follows here as well. There is one relevant difference in the present case—the parallel appointment of Mr. McKay here was not made at the same time as the Special Court’s appointment of the Independent Counsel under the Ethics Act but followed less than one month later. Consequently, defendants argue, the Independent Counsel’s appearance before the grand jury during this “gap” period of less than one month invalidates the indictment. The court, however, finds no prejudice to the defendants from the failure of these appointments to overlap and will not dismiss the indictment on this hyper-technical ground. See *United States v. Mechanik*, 475 U.S. 66, 71-72, 106 S.Ct. 938, 942 (1986); Fed. R. Crim. P. 52(a).

It is notable also that even in those cases in which Independent Counsel have proceeded without ever obtaining a back-up appointment by the Attorney General, the courts of this circuit have refused to dismiss indictments

brought under their authority. See *United States v. Deaver*, Cr. No. 87-096 slip op. (D.D.C. May 13, 1987) (Jackson, J.) (assuming without deciding that it may be bound by *Deaver v. Seymour*, 656 F.Supp. 900, 902 n.3 (D.D.C. 1987) and *In re Olson*, 818 F.2d 34 (D.C. Cir. Division for Appointing Independent Counsels (1987)); *In re Sealed Case*, Misc. Nos. 87-0197, 87-0205 & 87-0215, slip op. at 1 (D.D.C. July 20, 1987) (Robinson, C.J.) (holding Independent Counsel provisions of Ethics Act constitutional), *appeal argued Sept. 16, 1987*, Nos. 87-5261, 5264 & 5265 (D.C. Cir.)).

The pragmatic analysis of the Special Court in *In re Olson*, 818 F.2d 34, is also persuasive authority in support of the Act's constitutionality, although not binding on this court. *United States v. Deaver*, No. 87-3028, Order at 1 (D.C. Cir. June 15, 1987) (citing 28 U.S.C. § 49). Cf. *Banzhaf v. Smith*, 588 F.Supp. 1498, 1504-07 (D.D.C.) (upholding Independent Counsel provisions of Ethics Act), *vacated*, 737 F.2d 1167, 1168 (D.C. Cir. 1984) (finding district court lacked jurisdiction).

The court notes also that the Justice Department has reversed its position and now considers these provisions to be unconstitutional. See *In re Sealed Case*, Brief on Behalf of Amicus Curiae United States, Nos. 87-5261, 5264 & 5265 (D.C. Cir. filed Aug. 31, 1987). As explained earlier, however, the constitutionality issue need not be decided here as the indictment will stand on the authority of Independent Counsel's parallel appointment by the Attorney General. Motion denied.

IX. INDEPENDENT COUNSEL'S INDEPENDENCE

Defendants seek to have the indictment dismissed on the alternative ground that if the Ethics Act is found to be constitutional, its own requirements have been violated by the appointment of Independent Counsel McKay. Two arguments are advanced: (1) that the creation of a parallel Office of Independent Counsel within the De-

partment of Justice violates the letter and spirit of the Act, as reflected in §§ 592 and 593 and Congress' intent that the Independent Counsel be *outside and independent* of the Justice Department; and (2) that the appointment of Mr. McKay violates § 593(d)'s ban on Independent Counsels who have recently held a United States government office of profit or trust. The court, however, finds no inconsistency between the Attorney General's appointment and either the letter or the spirit of the Ethics Act.

The Attorney General did not create the Office of Independent Counsel to which Mr. McKay was appointed to restrict the independence of the Independent Counsel but to ensure the investigation's continuity while litigation challenging the constitutionality of the Ethics Act appointments was pending. As the regulations establishing the office stated: "this rule is not meant to question the independence or authority of the Independent Counsel appointed under the Act or to interfere in any way with his activities. To the contrary, this rule is intended to make certain that the necessary investigation and appropriate legal proceedings can proceed in a timely manner." 52 Fed. Reg. 22439 (to be codified at 28 C.F.R. Part 602).

Independent Counsel McKay himself, whose independence is the subject of these various statutory provisions and regulations, voluntarily accepted the Attorney General's parallel appointment. The court of appeals in *In re Sealed Case*, No. 87-5247 slip op. (D.C. Cir. Aug. 20, 1987), found the similar parallel appointment of Independent Counsel Walsh to be consistent with the Ethics Act, citing 28 U.S.C. § 597(a). Section 597(a) specifically authorizes a degree of cooperation and overlap between the Justice Department and Independent Counsel, stating that Independent Counsel may agree in writing to the continuation of investigations or proceedings by the Justice Department which are within the prose-

cutorial jurisdiction of the Independent Counsel. *Id.* at 12. Moreover, Independent Counsel's reliance on the parallel appointment in the issues discussed here amply demonstrates its value in supporting the exercise of his prosecutorial duties. The court finds the parallel appointment here does not threaten the independent authority of the Independent Counsel but is consistent with both the letter and spirit of the Ethics Act.

Defendants also claim that Independent Counsel McKay's appointment violates § 593(d), which prohibits the appointment as Independent Counsel of anyone "who holds or recently held any office of profit or trust under the United States." 28 U.S.C. § 593(d). Nine months prior to his appointment as Independent Counsel in this matter, Mr. McKay accepted an appointment as Independent Counsel in the investigation of former Assistant Attorney General Theodore Olson. McKay recused himself from the position one month later because of a potential conflict of interest, or its appearance, with his law firm Covington & Burling. Defendants now argue that this one month tenure constitutes a "recently held . . . office of profit or trust under the United States" and should, under the Act, invalidate his appointment here.

The purpose of § 593(d) is to ensure that the Independent Counsel is "independent, both in reality and in appearance, from the President and the Attorney General." *In re Olson*, 818 F.2d at 49 n.12 (quoting S. Rep. 170, 95th Cong., 1st Sess. 66 (1977), reprinted in 1978 U.S. Code Cong. & Admin. News 4216, 4282)). The court finds Mr. McKay's prior appointment—of only one month's duration and separated by eight months from his subsequent appointment here—to pose no danger to either the appearance or reality of his independence. *See id.* (Special Court found eight months between Morrison's departure from SEC and appointment as Independent Counsel adequate time to ensure independence). Motion denied.

X. LIMITS ON INDEPENDENT COUNSEL'S PROSECUTORIAL JURISDICTION

Defendants have argued for dismissal of the indictment on the ground that the Special Court exceeded its authority by defining the Independent Counsel's prosecutorial jurisdiction more broadly than the Attorney General's application had requested. This grant of jurisdiction, it is contended, usurped the Attorney General's authority to limit the scope of the Independent Counsel's jurisdiction, as intended by Congress. His jurisdictional authority thus tainted, Independent Counsel's investigation and subsequent indictments are invalid, defendants conclude. The court finds that the prosecutorial jurisdiction authorized here is within the statutory power plainly granted to the Special Court under the Ethics Act.

The relevant statutory provisions and the facts of this case speak clearly for themselves. Section 592(c)(1) of 28 U.S.C. provides for the Attorney General to request the Special Court to appoint an Independent Counsel when his preliminary investigation either (1) reveals reasonable grounds to warrant further investigation, or (2) does not within 90 days produce a determination that no such reasonable grounds exist. Under § 593(b), the Special Court then "shall appoint an appropriate independent counsel and shall define that independent counsel's prosecutorial jurisdiction." The Attorney General thereafter may refer related matters to the Independent Counsel, who may also request such referrals, under § 594(e).

On January 6, 1987, the Acting Attorney General recommended to the Special Court that the Independent Counsel here have jurisdiction to investigate two specific communications by Nofziger for federal criminal law violations and to prosecute any such violations established. The Special Court authorized the Independent Counsel to perform these functions and additionally to investigate

"other allegations and evidence of violation of any federal criminal law" by Nofziger which are "connected with or arising out of" the investigation. The Special Court also granted authority to prosecute any other entities or persons criminally involved in the communications under investigation, such as by conspiracy, or aiding or abetting, and to prosecute violations of federal laws concerning recalcitrant witnesses, obstruction of justice, or perjury, in connection with the investigation.

On March 6, 1987, the Acting Attorney General referred additional matters to the Independent Counsel, pursuant to § 594(e), which exactly parallel the jurisdictional scope granted by the Special Court. Independent Counsel McKay accepted this referral on that same date.

Section 593(b) explicitly places with the Special Court the responsibility to "define th[e] independent counsel's prosecutorial jurisdiction." Although there may be limits on this power, especially in the face of a contrary decision by the Attorney General, *see In re Olson*, 818 F.2d at 47, they are not reached in this case. The Special Court's initial grant of jurisdiction was broader than but not in conflict with the Attorney General's request. Moreover, the supplementary referral from the Attorney General removes any doubt as to his lack of opposition. The court finds the Special Court to be within its authority to grant the prosecutorial jurisdiction conferred on the Independent Counsel here. Motion denied.

XI. EXCULPATORY EVIDENCE BEFORE THE GRAND JURY

Defendant Bragg has also filed a motion to dismiss the indictment charging Independent Counsel with failure to present exculpatory evidence to the grand jury. Bragg alleges that the Independent Counsel knew of exculpatory evidence regarding the origins of the May 28, 1982 letter from Nofziger to James E. Jenkins which underlies

Count IV, and may not have fully presented this information to the grand jury, violating Bragg's fifth amendment guarantee of indictment by an unbiased and independent grand jury.

The function of the grand jury is not to judge the guilt or innocence of the accused but only to determine whether there is probable cause to believe he committed a crime. *United States v. Sears, Roebuck and Co.*, 719 F.2d 1386, 1394 (9th Cir. 1983), *cert. denied*, 465 U.S. 1079, 104 S.Ct. 1441 (1984). So long as this function is not impaired, there is no requirement that the prosecutor present the grand jury with evidence tending to negate other indications of guilt. *Id.*; see *United States v. Hawkins*, 765 F.2d 1482, 1488 (11th Cir. 1985) (government not obligated to present exculpatory evidence to grand jury) (citation omitted), *cert. denied*, 106 S.Ct. 886 (1986).

Defendant Bragg argues that Independent Counsel has evidence that Jenkins dictated the contents of the May 28, 1982 letter which was sent to him by Nofziger. This evidence, Bragg contends, eliminates the possibility that he could have possessed the intent to influence necessary to violate § 207(c), in causing Nofziger to send the letter. The court finds that both the circumstances of the letter's origins and any inference that may be drawn from it regarding defendant Bragg's intent are questions for the jury, going to innocence or guilt. These circumstances, even if taken as true and not presented to the grand jury, do not undermine the probable cause finding that underlies the indictment. Moreover, the court's review of Jenkins' testimony before the grand jury reveals that he did testify on the matter of the letter's origin.

The court has carefully examined each of defendants' motions. For the reasons discussed above, each of the

eleven pretrial motions filed jointly or individually by defendants Nofziger and Bragg is denied.

An appropriate Order accompanies this Memorandum Opinion.

/s/ Thomas A. Flannery
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Case No. 87-0309

UNITED STATES OF AMERICA

v.

FRANKLYN C. NOFZIGER
MARK A. BRAGG

[Filed Nov. 10, 1987]

ORDER

This matter came before the court upon various pre-trial motions by defendants Franklyn C. Nofziger and Mark A. Bragg. Upon consideration of defendants' motions, Independent Counsel responses, and oral argument, it is by the court this 10th day of November, 1987

ORDERED that defendant Bragg's motion to strike surplusage from the indictment is denied; and it is further

ORDERED that defendant Bragg's motion for a severance is denied; and it is further

ORDERED that defendants' joint motion for a hearing on Independent Counsel's potential conflicts of interest is denied; and it is further

ORDERED that defendant Nofziger's motion to require Independent Counsel to elect one count among Counts I - IV on grounds of multiplicity is denied; and it is further

ORDERED that defendant Bragg's motion to dismiss, on grounds that the aiding or abetting statute does not apply to section 207 violations, among other grounds, is denied; and it is further

ORDERED that defendants' joint motion to dismiss the indictment for failure to allege proper intent under section 207 is denied; and it is further

ORDERED that defendants' motion to dismiss on grounds that section 207 is unconstitutionally vague is denied; and it is further

ORDERED that defendants' joint motion to dismiss on grounds that appointment of the Independent Counsel is unconstitutional is denied; and it is further

ORDERED that defendants' joint motion to dismiss on grounds that appointment of the Independent Counsel violated the Independent Counsel provisions is denied; and it is further

ORDERED that defendants' joint motion to dismiss on grounds that Independent Counsel exceeded his proper prosecutorial jurisdiction is denied; and it is further

ORDERED that defendant Bragg's motion to dismiss for failure to present exculpatory evidence to the grand jury is denied.

/s/ Thomas A. Flannery
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Case No. 87-0309

UNITED STATES OF AMERICA

v.

FRANKLYN C. NOFZIGER

[Filed Apr. 7, 1988]

MEMORANDUM

This matter comes before the court on a motion by defendant Nofziger for judgment of acquittal, or in the alternative, a new trial. Defendant Nofziger argues for a judgment of acquittal on the grounds that the evidence admitted at trial is insufficient to support the jury's verdicts of guilty on Counts I, III and IV. Nofziger's alternative claim for a new trial is based on two arguments. First, he argues that each of the three verdicts of guilty is contrary to the weight of evidence. Second, the defendant attacks the court's instruction to the jury on the legal issue of "direct and substantial interest." The court concludes that the evidence introduced at trial is sufficient to sustain the jury's verdicts and that defendant Nofziger has not shown any basis for a new trial.

I. Judgment of Acquittal

Federal rule of criminal procedure 29(a) provides that: "The court . . . shall order the entry of judgment of acquittal . . . if the evidence is insufficient to sustain a conviction." This standard also applies after the jury has reached a verdict of guilty. See *United States v. Sutton*, 426 F.2d 1202, 1210 (D.C. Cir. 1969). In *Curley v. United States*, 160 F.2d 229, 232 (D.C. Cir.), cert. denied, 331 U.S. 837, 67 S. Ct. 1511 (1947) the circuit court articulated the now well-established standard:

a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justified inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt.

See also *Glasser v. United States*, 315 U.S. 60, 80, 62 S. Ct. 457, 469 (1942).

Count I

In Count I, defendant Nofziger was charged with having made a written communication on behalf of Welbilt Electronic Die Corporation (Welbilt) to Attorney General Meese with the intent to influence him regarding an Army contract for 13,100 small gas engines. The communication was a letter from Nofziger to Meese, dated April 8, 1982. Government's exhibit 345 (G345). Under § 207(c) of 18 U.S.C., this communication would be illegal only if the White House had a "direct and substantial interest" in the matter at the time the communication was made.

After a three week trial, the jury found Nofziger guilty of Count I.¹ The defendant now challenges the

¹ Defendant Nofziger was found guilty of Counts I, III and IV. He and defendant Mark Bragg were found not guilty on Count II.

sufficiency of the evidence, asserting that no reasonable jury could have found beyond a reasonable doubt that the White House had a direct and substantial interest in the Army engine contract. The analysis below will discuss the key pieces of evidence supporting each of the two elements of direct and substantial interest.

"Direct" White House Interest

Section 207(c) bars former White House officials from trying to influence current White House officials about certain matters in which the White House has a direct interest.² A plain reading of this "direct" interest requirement simply distinguishes matters of direct interest from matters of indirect or incidental interest. Instead of supplementing the commonly understood meaning of the word "direct" with dictionary definitions, the court sought to guide the jury on the word's application. The court instructed that direct White House interest could

² 18 U.S.C. § 207(c) reads in pertinent part:

(c) Whoever, . . . having been so employed as specified in subsection (d) of this section, within one year after such employment has ceased, . . . with the intent to influence, makes any oral or written communication on behalf of anyone other than the United States, to—

(1) the department or agency in which he served as an officer or employee, or any officer or employee thereof, and

(2) in connection with any judicial, rulemaking, or other proceeding, application, request for a ruling or other determination, contract, claim, controversy investigation, charge, accusation, arrest, or other particular matter, and

(3) which is pending before such department or agency or in which such department or agency has a direct and substantial interest—

Shall be fined not more than \$10,000 or imprisoned for not more than two years, or both.

be shown by the active concern³ or active involvement⁴ of White House officials, employees or representatives.

The White House representative with the most active involvement in Welbilt's bid for the Army engine contract was Pier Talenti, according to evidence introduced at trial. Talenti was a volunteer staffer in the Office of Political Affairs during the time Nofziger headed that office in 1981 and January of 1982. Nofziger served as Assistant to the President for Political Affairs from January 21, 1981 to January 21, 1982. Although it was a part of the "White House Office," the Office of Political Affairs was located in the Old Executive Office Building,⁵ next door to the White House building itself.

Several witnesses testified to Talenti's role in the Office of Political Affairs, including his special interest in "ethnic" issues. Although there was testimony casting doubt on whether Talenti acted with proper authorization, other testimony indicated that Talenti had a White House pass and reported directly to defendant Nofziger. Transcript (Tr.) at 1438-39.

Substantial evidence was presented of Talenti's active involvement with Welbilt and the engine contract. A Welbilt official, Mario Moreno, testified about Talenti's visit to the company's plant in the South Bronx in August of 1981. Robert Stohlman, an Army official, testified that

³ The court's oral instruction to the jury stated: "You may find that the interest of the White House in the matter was a direct interest if you find that an officer, employee or other representative of the White House was actively concerned with the matter." Transcript (Tr.) at 4128.

⁴ Upon the request of defense counsel, the court modified the written instruction that was sent back with the jury, substituting the words "actively involved" in place of "actively concerned." Tr. 4137-39.

⁵ The Old Executive Office Building is sometimes referred to as part of the White House, as it contains the offices of some White House officials.

he attended a meeting with Talenti at the Old Executive Office Building on August 28, 1981 to discuss the status of the engine contract. Tr. 2776-78.

An official of the SBA, Donald Templeman, testified that Talenti attended a meeting between the SBA and the Army, concerning the engine contract, on January 15, 1982. Tr. 2700-05. Henry Zuniga of Elizabeth Dole's office also was recorded as present. Mario Moreno also indicated that company officials met with Talenti in the Old Executive Office Building on January 18, 1982 to review the status of the engine contract. Tr. 1838-39. Moreno and Stohlman described Talenti as an active participant in their meetings with him.

A memorandum concerning political initiatives relating to Hispanics, G317a, from Nofziger to Elizabeth Dole, then Assistant to the President for Public Liaison, suggested that someone from Dole's staff be assigned to work with Talenti on "the South Bronx idea." The South Bronx idea apparently referred to a suggestion by Phil Sanchez that the White House schedule a photo session with John Mariotta, president of Welbilt and President Reagan in order to raise the Administration's profile with Hispanics.

The government argues that White House interest grew out of a campaign promise by then candidate Reagan to revitalize the South Bronx. There was repeated testimony that such a promise was made and that the defendant knew about it. Nofziger argues that this promise did not show White House interest because it occurred before Ronald Reagan became President, and because it was unrelated to the Army engine contract.

Nofziger also asserts several challenges to the specific evidence regarding Talenti's activities. He argues that Talenti's actions are too remote in time from April 8, 1982 to show White House interest on that date, especially in light of Talenti's departure from that office in January

1982. Defendant also argues that Talenti acted on his own and was too low-level an employee for his actions to show White House interest. This argument is supported by the lack of White House documents memorializing his efforts, defendant asserts.

Defendant Nofziger's arguments, while not implausible, are nonetheless characterizations of the evidence, which the jury was entitled to accept or reject. They do not undermine the jury's right to draw reasonable inferences leading to a different conclusion. The government's evidence is sufficient for the jury to have reasonably concluded that Talenti's actions showed direct White House interest.

Additional evidence supports the jury's conclusion of direct White House interest in the Army engine contract. The testimony of Edwin Meese, then Counselor to the President, revealed that as early as late spring or early summer 1981, Meese had asked Ed Thomas, one of his subordinates, to "look into this matter" because of complaints that Welbilt was not getting a fair hearing in its bid for the Army engine contract. Tr. 3214. Government's exhibit 305, dated July 13, 1981, is a notation by Mr. Meese that Ken Cribb of the Office of Cabinet Affairs would "stay on top of the situation," and that the matter should be brought up again with Meese or the office on August 13, 1981. Tr. 3215-16.

A "post-it" note on government's exhibit 345, from Mitchell Stanley, head of the correspondence unit, to James Jenkins, states: "JJ—Our Welbilt file is missing (even those under other possible headings!) I seem to remember everything being pulled together for a meeting in Dec-Jan. EM [Edwin Meese] may have at home. MFS" Tr. 2320. Government's exhibit 345, on which this post-it appears, is defendant Nofziger's April 8, 1982 letter to Mr. Meese. This letter, furthermore, refers to a meeting between Nofziger and Meese held three days be-

fore, on April 5th, at which the engine contract was discussed.⁶

Although less probative, evidence of events soon after April 8, 1982 also justifies inferences leading to the jury's finding of direct and substantial White House interest on that date. James Jenkins, Deputy Counselor to the President testified that he sought and obtained Meese's approval in April 1982 before attempting to facilitate the awarding of the contract to Welbilt. Jenkins also wrote to James Sanders, Administrator of the SBA, on April 22, 1982 stating "Ed Meese has asked me to look into the Welbilt problem." G355. Jenkins' testimony discounted the truth of this statement, however, as a technique he used to make sure he had Mr. Sanders' attention. This statement was not, Jenkins testified, an indication that Meese had actually asked him to look into it. Tr. 2450. Nofziger emphasizes that any White House action was sporadic and not followed-up, reflecting that the White House was reacting to the interests of others, not acting on its own initiative.

Defendant Nofziger argues that other evidence shows a lack of White House interest in the engine contract on April 8, 1982. Nofziger cites the testimony of Stephen Denlinger, who admitted, when asked, that he was "trying to cultivate people at the White House." Tr. 2119. Such testimony shows that the White House was not interested in the matter, defendant maintains. Nofziger also cites the lack of clear recollection on the part of White House officials, such as Mr. Meese, about the matter as indicating a lack of White House interest at the time.

The court concludes that the jury was entitled to credit or discredit these arguments in evaluating the evidence

⁶ The first paragraph of that letter reads as follows: "When I saw you on Monday, April 5, we discussed briefly the Welbilt Company's efforts to bring industry to the South Bronx though the medium of an Army contract to manufacture small engines."

before it. Unless accepted by the jury, these challenges do not discredit the government's evidence, nor prevent the reasonable inferences the government asked the jury to draw from them. The court finds that evidence of involvement by Meese, Jenkins, and other White House officials further supports the jury's finding of direct White House interest.

Substantial White House Interest

In order to trigger section 207(c), a former White House official's communication must concern a matter in which the White House has a "substantial" interest, as well as a direct interest. Giving this language its plain meaning, this requirement limits the statute's prohibitions to matters of substantial White House interest, and excludes from coverage other matters in which interest is insubstantial or insignificant.

As with the element of direct interest, the court sought to guide the jury on the application of the substantial interest requirement, rather than adding dictionary definitions to the term's common meaning. The court instructed the jury that substantial interest can be shown by the "effort" expended by White House personnel on the matter and by the matter's "importance" to the White House.

The efforts of Mr. Talenti, Mr. Meese and Mr. Jenkins more than adequately support the jury's finding of substantial White House interest. This evidence of White House effort and concern, following candidate Reagan's campaign promise to rebuild the economy of the South Bronx, reasonably justifies a conclusion that White House interest in this matter was substantial. Moreover, John Mariotta's attendance at a White House meeting on Urban Enterprise Zones held January 21, 1982 suggests a political interest consistent with the government's theory.

Nofziger's April 8th letter to Meese further supports this theory as it states:

awarding the contract to Welbilt would be a major first step in the President's commitment to revitalize the South Bronx. . . .

. . . .

Ed, I really think it would be blunder not to award that contract to Welbilt. The symbolism either way is very great here.

The court concludes that evidence of the April 5th meeting between Meese and Nofziger, as well as Meese's earlier involvement with the matter, reasonably supports the jury's finding that the White House had a substantial interest in the award of the engine contract.

Having considered each of these two elements separately, the court concludes that the evidence presented by the government is sufficient for a reasonable jury to have concluded that the White House had a direct and substantial interest in the Army engine contract.

Count III

In Count III, Nofziger was charged with an unlawful August 20, 1982 written communication on behalf of the Marine Engineers Beneficial Association (MEBA) to Mr. Meese regarding the expansion of "civilian manning," which relies on civilian merchant crews to staff noncombat Navy support vessels. G121. The communication was a post-script added to a copy of a thank-you note to Jesse Calhoon, the president of MEBA, which was sent to Meese. Copies of the note, with the post-script, were also sent to Jim Jenkins and Jim Baker. In the post-script, Nofziger mentions Calhoon's support for the President and that Calhoon has been "trying to get action on civilian manning of some naval ships, without result, even though the President has asked that it be done." Nofziger concludes: "Why not help our friends?"

Defendant Nofziger challenges the sufficiency of the evidence regarding this count on two grounds. First, Nofziger argues that the evidence does not support a finding that civilian manning was a "particular matter" within the meaning of § 207(c). Under § 207(c) a communication is prohibited only if, among other things, it concerns a "particular matter" in which the former government official's agency has a direct and substantial interest. Second, defendant argues that civilian manning was not a matter of "direct and substantial interest" to the White House.

Particular Matter

Communications may be barred under § 207(c) only if they relate to "particular matter[s]" of agency interest. As the common meaning of these words indicates, and as the court instructed the jury, this statutory ban does not apply to broad policy issues, such as "a matter of general concern . . . like poverty, unemployment or housing." Borrowing examples from the statute, the court further instructed the jury: "A particular matter can include, among other things, a proceeding, an application, a request for a ruling or other determination, a contract, a claim, or any other particular matter."

Defendant Nofziger argues that civilian manning was a general policy issue, one part of a broader maritime policy, that never became particularized. It was not converted into jobs or contracts; there were no parties to any proceeding, nor any real controversy, defendant asserts. The documents on which the government relies, Nofziger continues, reflect this generality.

The government describes the matter in question differently. The expansion of civilian manning had become a particular matter, it maintains, because the issue had moved beyond general policy discussion into implementation. It was the implementation of the policy that the communication was directed to, according to the govern-

ment, and it was implementation in which the White House was interested. Regulations promulgated by the Office of Personnel Management to "give content to the restrictions on post employment activity established by Title V of the [Ethics in Government] Act [of 1978] (18 U.S.C. 207)," ⁷ state that the matter "need not be one 'involving specific parties,' and thus is not limited to disputed proceedings or contracts in which a party has already been identified." 5 C.F.R. § 737.11(d).

The government introduced several pieces of evidence in support of its view. The Cabinet Council on Commerce and Trade approved the expansion of civilian manning as one of a number of initiatives presented by the Department of Transportation at a meeting on August 4, 1982 at which the President and a number of Cabinet members were present. That the matter was sufficiently particularized is shown by a question asked by the President at that meeting and by the responses it generated.

Testimony by James Jenkins at trial revealed that at the August 4, 1982 Cabinet Council meeting, President Reagan asked what had happened to the proposal for setting aside some noncombatant Navy support ships for manning by civilians. Jenkins recounted that then Secretary of Defense Weinberger responded that it was in fact being done. Tr. 2302.

James Jenkin's post-it note on G121 corroborated this testimony. In response to Nofziger's written question "Why not help our friends?" on the copy of the letter he received, Jenkins jotted the notation: "Cap assured the Cab.[inet] Council mtg on maritime policy that this is being done!" (emphasis in original). This evidence is supported by the testimony of Craig Fuller, who was Assistant to the President for Cabinet Affairs in 1981. Fuller testified about a document dated March 5, 1982

⁷ 5 CFR § 737.1(a).

that described actions taken by the Reagan Administration to implement the President's maritime policy commitments. G108. Fuller agreed this document reflects that civilian manning was one of the actions implemented in fulfilling the President's maritime commitments. Tr. 1247.

Fuller also testified about a meeting chaired by Ed Harper on April 7, 1982. Fuller recorded Harper as saying "We are not here to discuss whether but how to implement 'the promise which President Reagan feels strongly is his personal commitment to the concept of contract [civilian] manning." Tr. 1257-58. Fuller stated further that after the August 4, 1982 Cabinet Counsel meeting at which the President "reaffirmed" his support for expanding civilian manning, Fuller was asked to follow-up "to assure that that element of our maritime policy commission was in fact implemented and that the Navy did make progress in placing civilians on these naval ships." Tr. 1223-24.

Nofziger's August 20, 1982 letter to Meese shows that the implementation of greater civilian manning was the subject of the communication. Nofziger's post-script focuses on the government's failure to implement the policy, not on whether there is abstract agreement about the matter in principle. Nofziger writes: "[Calhoon has] been trying to get action on civilian manning of some naval ships, without result, even though the President has asked that it be done." G121.

In light of this evidence, the court concludes that the jury could reasonably have concluded that the implementation of the policy of expanded civilian manning was the subject matter of the communication and the focus of White House interest. The jury was equally justified in finding that expanding the use of civilian manning was a "particular matter," within the meaning of § 207(c).

Direct and Substantial Interest

The government's evidence discussed above also is probative of the White House's "direct and substantial interest" in expanding civilian manning of Navy support vessels. Testimony about the August 4, 1982 Cabinet Council meeting revealed the President's personal interest in the civilian manning matter. Fuller's testimony also showed that Reagan supported this policy before becoming President and that the issue had been present on the White House agenda from the beginning of his administration. Then Secretary of the Navy Lehman testified that even in the face of "fairly strong[]" Navy opposition, Tr. 1345-46, the Reagan Administration "very definitely" kept the President's campaign promise to expand civilian manning. Tr. 1385-86.

The court finds the evidence more than ample to support the jury's conclusion that the White House had a direct and substantial interest in the particular matter of expanding civilian manning of Naval ships on August 20, 1982.

Count IV

In Count IV, Nofziger was charged with an unlawful oral communication on behalf of Fairchild Republic Corporation (Fairchild) to Richard Levine and Horace Russell, then staff members of the National Security Counsel (NSC), regarding funding for continued production of the A-10 aircraft. This communication was made during a meeting at the White House on September 24, 1982. Nofziger argues that the government failed to present sufficient evidence to justify the jury's finding of "direct and substantial" White House interest in the specific matter of A-10 funding.

The President's Budget for fiscal year 1983 had proposed continued funding for A-10 production. This item was deleted in the summer of 1982 by the Senate Armed Services Committee. Substantial evidence was introduced

at trial showing that the White House made a deal with a number of Congressmen from Long Island who agreed to vote in favor of the Tax Equity and Fiscal Responsibility Act (TEFRA) if their votes were needed to ensure its passage, in return for the President's reaffirmation of his support for funding A-10 production. Nofziger contends that the White House was interested in the A-10 only indirectly, as a means to achieve the passage of TEFRA.

The government introduced an August 10, 1982 memorandum from the President to then Secretary of Defense Weinberger that stated in part: "This memorandum reaffirms my decision to retain the A-10 close air support aircraft production as requested in the FY '83 budget." David Stockman, then Director of the Office of Management and Budget (OMB) testified that the White House had a strong institutional interest in ensuring that the directive was implemented, in order to protect the President's reputation for keeping his word. Tr. 2998. The testimony of Levine, Tr. 3150-51, and the memorandum he prepared summarizing the September 24 meeting, G235, both described Nofziger as stating that the implementation of the memorandum was important to the President's political reputation.⁸

Nofziger challenges the degree of Presidential interest reflected by the memorandum and questions whether the President personally signed or authorized it. Defendant further seeks to minimize the importance attached to the memorandum, arguing that it was not taken seriously, and recounting the testimony of Thomas Guarino, a Fairchild official, that it was very difficult to obtain a

⁸ G235 reads in pertinent part as follows: "Nofziger noted that if these three DOD actions are not undertaken, the President's political word on the Hill might not mean as much as it once did because the President's affirmation of the A-10 production, as noted in his August 20 memo to the Secretary of Defense, might be seen as pro forma."

copy of the memorandum for weeks after it was issued. Tr. 2669-70. Nofziger argues that the interest expressed in the August 20 memorandum was only indirectly in the A-10 and principally in the political stature of the President.

Evidence was also introduced at trial of earlier White House activity relating to the A-10. This activity included a brief meeting in November 1981 between Meese and officials of Fairchild Industries, manufacturers of the A-10, and an April 1982 memo from Meese to officials at the Departments of Defense and State regarding "what, if anything" to do about foreign sales of the A-10. Meese testified, furthermore, that he had supported continued production of the A-10 in part because it contributed to "maintaining the employment situation on Long Island." Tr. 3231.

Nofziger argues that any White House activity that did occur on the A-10 funding issue was sporadic and unrelated, and did not reflect either a direct or a substantial interest on the part of the White House regarding continued funding of the A-10. Instead, Fairchild was trying to create an interest in the White House that it felt did not exist, according to the testimony of Stanton Anderson. Tr. 3638. Defendant argues further that the fact that the September 24, 1982 meeting was attended by two NSC staffers instead of National Security Advisor William Clark, as originally planned, is indicative of the low level of White House interest.

Defendant Nofziger's challenges seek to show that the jury should have drawn different inferences from the facts than their verdict would indicate. He has not, however, shown the inferences the jury apparently did draw to be unreasonable. The court finds the evidence recounted above sufficient to support the jury finding beyond a reasonable doubt that the White House had a

"direct and substantial" interest in funding for continued production of the A-10.

The court has examined defendant Nofziger's challenges to the sufficiency of the evidence on each count and finds no basis in them to overturn the jury's findings of guilty on Counts I, III, and IV.

II. *New Trial*

A. *Weight of the Evidence*

Under rule 33 of the federal rules of criminal procedure, the court may grant a new trial "if required in the interest of justice." Fed. R. Crim. P. 33. Nofziger asserts two grounds which, he argues, require the court to grant a new trial. First, he contends that the weight of the evidence, when viewed independently by the court, is so contrary to the jury's verdict that the court should grant a new trial. Second, he challenges the court's instruction to the jury on the legal element of "direct and substantial interest."

In reviewing a challenge to the verdict as against the weight of the evidence, the court applies a different standard than in reviewing the sufficiency of the evidence. The court is not required to view the evidence most favorably to the prosecution, but may examine it with an independent mind, assessing the credibility of witnesses and giving the evidence whatever weight it deems appropriate. *United States v. Lincoln*, 630 F.2d 1313, 1319 (8th Cir. 1980). The court has wide discretion in making this assessment. *United States v. Kelly*, 748 F.2d 691, 701 (D.C. Cir. 1984) (citing *Lincoln*).

In its earlier discussion of the sufficiency of the evidence, the court examined the defendant's central challenges to the evidence and the inferences to be drawn from them. Defendant has suggested alternative characterizations of the evidence, which if accepted would lead

to a verdict of not guilty. Essentially, Nofzinger argues that the evidence in Counts I, III, and IV does not show a level of White House interest sufficient either in directness or substantiality to satisfy this element.

The court acknowledges that the evidence of White House interest in Welbilt's bid for the Army engine contract in Count I could plausibly fit defendant's characterization. Plausibility, however, is not the standard. Although much of the government's evidence of White House interest concerned the activities of Pier Talenti, a White House volunteer who did not testify at trial, there was sufficient evidence from other sources to adequately establish the extent and nature of Talenti's activities.

Additional evidence showed that Meese and Jenkins, among other White House officials, knew about and facilitated Welbilt's efforts to get the engine contract. This evidence is sufficient to establish a context in which Talenti's lower level activities could sensibly be seen as in the service of higher level White House interests. Weighing the evidence independently, the court finds it to be consistent with, and not contrary to, the jury's verdict of guilty on Count I.

On Count III, the evidence strongly shows that the matter at issue was the concrete process of implementing the civilian manning policy. No one has disputed that the Reagan Administration long supported the general policy of civilian manning. Nofzinger's efforts on behalf of MEBA were directed to having that commitment carried out. The President's personal inquiry as to what had happened with this effort is quite logically seen as an expression of interest in the policy's implementation status, since this was the only aspect of the issue about which there was any question.

The court considers the evidence clearly to establish that this implementation was a particular matter within

the meaning of § 207(c). The court also concludes that the President's inquiry, as well as the approval of the issue by the Cabinet Council show that this matter was of direct and substantial interest to the White House.

As to Count IV, Nofziger challenges the adequacy of the evidence of direct and substantial White House interest in funding for continued production of the A-10 aircraft. Essentially, defendant argues that the evidence shows White House interest that is only indirectly related to funding of the A-10. With regard to the deal to trade the votes of several Long Island Congressmen on the TEFRA bill in exchange for a memorandum reaffirming White House support of the A-10, Nofziger argues that the White House's direct interest was limited to passing TEFRA. A-10 funding was only a mechanism to achieve that end. Similarly, defendant argues, the testimony about White House interest in implementing that memorandum only showed direct White House interest in preserving the President's word on Capital Hill. A-10 funding was again only the means used to satisfy a separate substantive purpose, Nofziger asserts.

Defendant Nofziger's arguments are insufficient, however. Defendant suggests alternative theories through which to view the evidence of White House interest. These theories are not frivolous, but neither are they convincing enough to persuade the court to grant a new trial. The government's view that the White House cared about A-10 production itself is bolstered by evidence of White House concern for the economic implications of the Long Island Fairchild plant closing down. The court finds the evidence introduced at trial to solidly support a finding of direct and substantial White House interest in funding for continued production of the A-10.

B. The Jury Instruction on "Direct and Substantial Interest"

Defendant Nofziger based his defense in large part on the argument that the White House did not have a

"direct and substantial interest" in the subjects of his communications, as is required to violate the statute. This element should be interpreted narrowly, defendant asserts, particularly with respect to communications with White House officials. This is so, he argues, because unlike other federal agencies, the White House has an "arguable 'interest'" in everything. Without a narrow construction, defendant contends, the statute is unconstitutionally vague.⁹ Nofziger now argues that the court failed to appropriately define the meaning of the phrase "direct and substantial interest" in its instruction to the jury.

Nofziger offers several challenges to the court's instruction. Defendant objects that the court: (1) failed to include adequate definitions of the terms "direct" and "substantial," such as those he had suggested, (2) improperly allowed the jury to find "direct" White House interest from evidence that a White House official, employee, or representative was "actively concerned" with the matter, (3) failed to emphasize that a finding of "*both direct and substantial interest*" was required for a verdict of guilty, (4) failed to include his requested statement that not every matter passing through the White House is of direct and substantial interest to that entity, (5) failed to direct the jury to focus on the activities of White House staff and ignore the subjective views of non-White House personnel regarding the nature of White House interest, and (6) failed to include his instruction that the jury consider whether the White House had jurisdiction over the matter, the number and nature of personnel involved, and the number and nature of other matters being worked on at the same time.

⁹ The court denied defendant's motion to dismiss the indictment on grounds that the statute was unconstitutionally vague. Memorandum Opinion, at 27-36 (Nov. 10, 1987). Acknowledging the court's pretrial ruling, defendant argues that the greater information now available to the court demonstrates the unconstitutionality of § 207(c) on its face.

The test of the sufficiency of the court's instruction is whether the instruction clearly indicates the circumstances under which the crime can be found to have been committed. See *Graham v. United States*, 187 F.2d 87, 90 (D.C. Cir.), *cert. denied*, 341 U.S. 920, 71 S.Ct. 741 (1951); *Jones v. United States*, 307 F.2d 190, 192 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 919, 83 S.Ct. 733 (1963). "It is axiomatic that it is not error to refuse requested instructions, even though they may be correct statements of law, if the subject matter has been properly covered by the charge given." *Thomas v. United States*, 121 F.2d 905, 910-11 (D.C. Cir. 1941) (footnote omitted); see *United States v. Gambler*, 662 F.2d 834, 837 (D.C. Cir. 1981).

The court agrees that the application of the "direct and substantial interest" element of the statute is especially critical with regard to the White House because of the lack of inherent limits on its "interest" jurisdiction. Because the White House potentially may be interested in nearly any matter, it is fair to hold a former White House official criminally liable only for attempting to influence such direct and substantial interests as he reasonably can be expected to have been aware. That difference, in the opinion of the court, does not make the statute unconstitutionally vague, however. Nor does it require the court to impose lengthy, detailed and technical definitions of these terms on the jury's application of this element to the facts.

In the November 10, 1987 memorandum opinion denying defendant's motion to dismiss the indictment on grounds of unconstitutional vagueness, the court stated:

The final determination as to whether the . . . White House had a 'direct and substantial interest' in the matters charged here has not been left to the discretion of Independent Counsel but has passed the scrutiny of a federal grand jury and ultimately will be decided by an impartial jury. These constraints

further ensure that the terms can and must be measured by both the prosecutor and defendants according to their objective meaning, which defendants are fully capable of understanding.

Memorandum Opinion, at 31 (Nov. 10, 1987).

Although the court does not suggest that this is a simple statute,¹⁰ or that its boundaries have been well established, the court adheres to the view that the statute must necessarily be applied by the jury according to the common meaning of its essential terms. Under this approach, defendant Nofziger can fairly be held responsible for anticipating the scope of the statute's prohibitions, which are applied by an impartial jury and not by the prosecutor.

Consistent with this view, the court's instructions attempted to guide the jury in this task, by illustrating and clarifying the application of these terms to this particular context, but they did not attempt explicitly to define the terms "direct and substantial."

1. *The Definition of "Direct and "Substantial"*

Nofziger argues that the failure to include his "dictionary definitions" of the terms "direct" and "substantial," or to otherwise define these terms, was error justifying a new trial. These are common terms, however, with well-accepted meanings. Generic dictionary-type definitions would have added nothing to the jury's common-sense understanding. Consequently, the court's instruction provided only what specific guidance was most useful to their application of these terms in the context of this case.

With regard to "direct" interest, the court instructed the jury as follows:

¹⁰ The court has acknowledged that the statute is "hardly a model of clarity." Tr. 3416.

The term "direct" refers to the nature of the interest or involvement of The White House in the matter. You may find that the interest of The White House was a "direct" interest if you find that an officer, employee, or other representative of The White House was actively concerned¹¹ with the matter. Such active interest may be shown, for example, by giving advice, by making recommendations, or by giving approval or disapproval. The White House may have a direct interest in a matter even if the final action or decision making concerning the matter may have been the responsibility of an agency other than The White House.

With regard to "substantial" interest, the court's instruction read as follows:

The term "substantial" refers to the extent and the significance of the interest or involvement of The White House in a particular matter. It is not necessary for you to find that a particular matter was of major importance to the White House as compared to others matters. In deciding whether The White House had a "substantial" interest in the matter, you may consider the effort devoted by officers, employees, or other representatives of The White House on the matter and the importance of the matter to The White House.

2. Personal Interest or Official White House Interest

Nofziger objects to the court's oral instruction that "You may find that the interest of The White House in the matter was a 'direct' interest if you find that an officer, employee, or other representative of The White

¹¹ Upon the request of defense counsel, the written instruction sent back with the jury substituted "actively involved" in place of "actively concerned."

House was actively concerned¹² with the matter." The defendant objects to this instruction because, he says, it allowed the jury to find "direct" White House interest from the personal interest of any representative of the White House, regardless of the level of that person's responsibility or authorization.

The court disagrees. The clear implication of this language, in the context of the entire instruction, was to require active concern or involvement of an official nature, not a mere personal interest. The government's case relied on showing the authority of each White House official whose actions were presented as indicative of White House interest. Nofziger argued to the jury that Talenti acted on his own and without authorization. The jury was entitled to reject defendant's argument. There is no reason to believe that the jury based its decision on the personal interest of any White House employee.

3. *The Need to Show Both Direct and Substantial Interest*

Nofziger claims that it was error for the court to fail to emphasize that the jury must find White House interest to be "*both direct and substantial*" to convict, and that the absence of either element would require a verdict of not guilty. This claim is baseless. The court's instruction separately and specifically discussed the two individual elements of "direct" and "substantial" interest and the considerations relevant to each. The court's oral instruction then stated "To find the defendants guilty, you must find beyond a reasonable doubt that the particular matters alleged in the indictment were of direct and substantial interest to The White House on the dates charged in the indictment." The written instruction was modified on defendant's request to add the word "both" prior to "direct *and* substantial interest." (emphasis

¹² Upon the request of defense counsel, the written instruction, sent in with jury, substituted the word "involved" in place of the word "concerned."

in original) In this context, the court believes the jury was clearly instructed as to the separate elements necessary before the defendant could be found guilty.

4. *Insignificant White House Matters*

Defendant also asserts as error the instruction's failure to state that every matter passing through the White House was not a matter of direct and substantial interest. This notion, intended to prevent the jury from being overly impressed with the importance of the matters at issue merely because they were associated with the White House, is implicit in the instruction as given.

The jury was instructed generally that the government had the burden of proving every element of the offense. The court's instruction on § 207 specified that White House interest must be found both to be direct and to be substantial. Each element was discussed separately and examples were given of the sorts of activity that would satisfy each element. These instructions clearly established the jury's affirmative duty critically to evaluate whether the government had met its burden with regard to each and every element.

5. *The Relevance of Views of Non-White House Personnel*

Nofziger objects further to the court's failure to include a statement directing the jury to focus on the activity of White House personnel, and to ignore the subjective views of non-White House personnel regarding the nature of White House interest. This proposal reflects the defendant's view that the opinions of non-White House personnel are irrelevant to a finding of White House interest. Although the court agrees that the activities and statements of White House personnel are likely to be better evidence of White House interest, the court does not conclude that the views of those outside of the White House will always be irrelevant to a showing of White House interest.

The court instructed the jury: "In deciding whether the White House had a 'substantial' interest in the matter, you may consider the effort devoted by officers, employees, or other representatives of The White House on the matter and the importance of the matter to the White House." Under this instruction, the jury was entitled to consider testimony by both White House and non-White House witnesses that showed White House effort on the matter or showed that the matter was important to the White House. Defendant's proposed instruction would have improperly prevented the jury from considering such evidence even if probative of the ultimate issue.

6. *Proposed Instruction on Jurisdiction, Personal & Relativity*

Finally, Nofziger complains that the court improperly failed to include his instruction that the jury consider (a) whether the White House had jurisdiction over the matter, (b) the number and nature of personnel involved, and (c) the number and nature of other matters being worked on at the same time. The court found this proposal to add nothing to the instruction given while creating greater potential for confusion.

"Jurisdiction" is a technical legal term and its use would have been more likely to confuse than aid the jury's work. The number and nature of personnel involved in a matter is relevant but was adequately covered by the court's instruction allowing the jury to consider the "effort" expended by White House personnel on the matter.

Nofziger's proposal that the jury be instructed to consider the number and nature of other matters also being worked on by White House personnel was inappropriate. Such an instruction would have suggested, as Nofziger's counsel did at trial, that the threshold of "substantial" White House interest should be measured by the relative

importance of the matter as compared to other matters also of current interest to the White House.

The court reads no relativity requirement in the statute. The jury was fully capable of assessing whether the evidence rose to a level showing "substantial" interest, as that term is commonly understood, without specifically considering the level of White House interest in other matters. Such a comparison was potentially confusing while offering no countervailing benefits.

Conclusion

The court has carefully reviewed defendant's challenges to the sufficiency of the evidence, the weight of the evidence, and the appropriateness of the jury instructions, and finds no grounds for granting a judgment of acquittal or a new trial. The motions are denied.

/s/ Thomas A. Flannery
United States District Judge

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APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1988

CR 87-00309-01

No. 88-3058

UNITED STATES OF AMERICA

v.

FRANKLYN C. NOFZIGER,

Appellant

BEFORE: Edwards, Buckley and Williams, Circuit
Judges

[Filed Sept. 5, 1989]

ORDER

Upon consideration of appellee's Petition For Rehearing, filed August 11, 1989, it is

ORDERED, by the Court, that the Petition is denied.

Per Curiam

For the Court:

CONSTANCE L. DUPRE,
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Circuit Judge Edwards would grant the petition for rehearing.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1988

CR 87-00309-01

No. 88-3058

UNITED STATES OF AMERICA

v.

FRANKLYN C. NOFZIGER,

Appellant

[Filed Sept. 5, 1989]

BEFORE: Wald, Chief Judge; Mikva, Edwards, Ruth B.
Ginsburg, Silberman, Buckley, Williams,
D. H. Ginsburg and Sentelle, Circuit Judges

ORDER

Appellees's suggestion for rehearing *en banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam

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For the Court:

CONSTANCE L. DUPRE,
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

A statement of Circuit Judge Edwards, concurred in by Chief Judge Wald and Circuit Judges Mikva and Ruth B. Ginsburg, is attached.

EDWARDS, *Circuit Judge*, with whom WALD, *Chief Judge*, MIKVA, and GINSBURG, RUTH B., *Circuit Judges*, concur, concurring in the denial of the suggestion for rehearing *en banc*:

I think that the majority opinion in this case is clearly wrong; however, this is not a basis for *en banc* consideration by the court. Therefore, I concur in the denial of the suggestion for rehearing *en banc*. Any further consideration of this case must be pursuant to review by the Supreme Court.

APPENDIX F

§ 207. Disqualification of former officers and employees;
disqualification of partners of current officers and
employees

(a) Whoever, having been an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, including a special Government employee, after his employment has ceased, knowingly acts as agent or attorney for, or otherwise represents, any other person (except the United States), in any formal or informal appearance before, or, with the intent to influence, makes any oral or written communication on behalf of any other person (except the United States) to—

(1) any department, agency, court, court-martial, or any civil, military, or naval commission of the United States or the District of Columbia, or any officer or employee thereof, and

(2) in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties in which the United States or the District of Columbia is a party or has a direct and substantial interest, and

(3) in which he participated personally and substantially as an officer or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise, while so employed; or

(b) Whoever, (i) having been so employed, within two years after his employment has ceased, knowingly acts as agent or attorney for, or otherwise represents, any other person (except the United States), in any formal or informal appearance before, or, with the intent to

influence, makes any oral or written communication on behalf of any other person (except the United States) to, or (ii) having been so employed and as specified in subsection (d) of this section, within two years after his employment has ceased, knowingly represents or aids, counsels, advises, consults, or assists in representing any other person (except the United States) by personal presence at any formal or informal appearance before—

(1) any department, agency, court, court-martial, or any civil, military or naval commission of the United States or the District of Columbia, or any officer or employee thereof, and

(2) in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in which the United States or the District of Columbia is a party or has a direct and substantial interest, and

(3) as to (i), which was actually pending under his official responsibility as an officer or employee within a period of one year prior to the termination of such responsibility, or, as to (ii), in which he participated personally and substantially as an officer or employee; or

(c) Whoever, other than a special Government employee who serves for less than sixty days in a given calendar year, having been so employed as specified in subsection (d) of this section, within one year after such employment has ceased, knowingly acts as agent or attorney for, or otherwise represents, anyone other than the United States in any formal or informal appearance before, or, with the intent to influence, makes any oral or written communication on behalf of anyone other than the United States, to—

(1) the department or agency in which he served as an officer or employee, or any officer or employee thereof, and

(2) in connection with any judicial, rule-making, or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter, and

(3) which is pending before such department or agency or in which such department or agency has a direct and substantial interest—

shall be fined not more than \$10,000 or imprisoned for not more than two years, or both.

(d) (1) Subsection (c) of this section shall apply to a person employed—

(A) at a rate of pay specified in or fixed according to subchapter II of chapter 53 of title 5, United States Code, or a comparable or greater rate of pay under other authority;

(B) on active duty as a commissioned officer of a uniformed service assigned to pay grade of O-9 or above as described in section 201 of title 37, United States Code, or

(C) in a position which involves significant decision-making or supervisory responsibility, as designated under this subparagraph by the Director of the Office of Government Ethics, in consultation with the department or agency concerned. Only positions which are not covered by subparagraphs (A) and (B) above, and for which the basic rate of pay is equal to or greater than the basic rate of pay for GS-17 of the General Schedule prescribed by section 5332 of title 5, United States Code, or positions which are established within the Senior Executive Service pursuant to the Civil Service Reform Act of

1978, or positions of active duty commissioned officers of the uniformed services assigned to pay O-7 or O-8, as described in section 201 of title 37, United States Code, may be designated. As to persons in positions designated under this subparagraph, the Director may limit the restrictions of subsection (c) to permit a former officer or employee, who served in a separate agency or bureau within a department or agency, to make appearances before or communications to persons in an unrelated agency or bureau, within the same department or agency, having separate and distinct subject matter jurisdiction, upon a determination by the Director that there exists no potential for use of undue influence or unfair advantage based on past government service. On an annual basis, the Director of the Office of Government Ethics shall review the designations and determinations made under this subparagraph and, in consultation with the department or agency concerned, make such additions and deletions as are necessary. Departments and agencies shall cooperate to the fullest extent with the Director of the Office of Government Ethics in the exercise of his responsibilities under this paragraph.

(2) The prohibition of subsection (c) shall not apply to appearances, communications, or representation by a former officer or employee, who is—

(A) an elected official of a State or local government, or

(B) whose principal occupation or employment is with (i) an agency or instrumentality of a State or local government, (ii) an accredited, degree-granting institution of higher education, as defined in section 1201(a) of the Higher Education Act of 1965, or (iii) a hospital or medical research organization, exempted and defined under section 501(c)(3) of the Internal Revenue Code of 1986, and the appear-

ance, communication, or representation is on behalf of such government, institution, hospital, or organization.

(e) For the purposes of subsection (c), whenever the Director of the Office of Government Ethics determines that a separate statutory agency or bureau within a department or agency exercises functions which are distinct and separate from the remaining functions of the department or agency, the Director shall by rule designate such agency or bureau as a separate department or agency; except that such designation shall not apply to former heads of designated bureaus or agencies, or former officers and employees of the department or agency whose official responsibilities included supervision of said agency or bureau.

(f) The prohibitions of subsections (a), (b), and (c) shall not apply with respect to the making of communications solely for the purpose of furnishing scientific or technological information under procedures acceptable to the department or agency concerned, or if the head of the department or agency concerned with the particular matter, in consultation with the Director of the Office of Government Ethics, makes a certification, published in the Federal Register, that the former officer or employee has outstanding qualifications in a scientific, technological, or other technical discipline, and is acting with respect to a particular matter which requires such qualifications, and that the national interest would be served by the participation of the former officer or employee.

(g) Whoever, being a partner of an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, including a special Government employee, acts as agent or attorney for anyone other than the United States before any department, agency, court, court-martial, or any civil, military, or naval commission of the United States or the District of Columbia, or any

officer or employee thereof, in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter in which the United States or the District of Columbia is a party or has a direct and substantial interest and in which such officer or employee or special Government employee participates or has participated personally and substantially as an officer or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, or which is the subject of his official responsibility, shall be fined not more than \$5,000, or imprisoned for not more than one year, or both.

(h) Nothing in this section shall prevent a former officer or employee from giving testimony under oath, or from making statements required to be made under penalty of perjury.

(i) The prohibition contained in subsection (c) shall not apply to appearances or communications by a former officer or employee concerning matters of a personal and individual nature, such as personal income taxes or pension benefits; nor shall the prohibition of that subsection prevent a former officer or employee from making or providing a statement, which is based on the former officer's or employee's own special knowledge in the particular area that is the subject of the statement, provided that no compensation is thereby received, other than that regularly provided for by law or regulation for witnesses.

(j) If the head of the department or agency in which the former officer or employee served finds, after notice and opportunity for a hearing, that such former officer or employee violated subsection (a), (b), or (c) of this section, such department or agency head may prohibit that person from making, on behalf of any other person (except the United States), any informal or formal appearance before, or, with the intent to influence, any oral

or written communication to, such department or agency on a pending matter of business for a period not to exceed five years, or may take other appropriate disciplinary action. Such disciplinary action shall be subject to review in an appropriate United States district court. No later than six months after the effective date of this Act, departments and agencies shall, in consultation with the Director of the Office of Government Ethics, establish procedures to carry out this subsection.

(Added Pub. L. 87-849, § 1(a), Oct. 23, 1962, 76 Stat. 1123, and amended Pub. L. 95-521, title V, § 501(a), Oct. 26, 1978, 92 Stat. 1864; Pub. L. 96-28, §§ 1, 2, June 22, 1979, 93 Stat. 76; Pub. L. 99-514, § 2, Oct. 22, 1986, 100 Stat. 2095.)

APPENDIX G

HOUSE OF REPRESENTATIVES

95th Congress, 2d Session

Report No. 95-1756

ETHICS IN GOVERNMENT ACT OF 1978

October 11, 1978.—Ordered to be printed

MR. DANIELSON, from the committee of conference,
submitted the following

CONFERENCE REPORT

[To accompany S. 555]

* * * *

[73]

* * * *

TITLE V—POST-EMPLOYMENT CONFLICT OF INTEREST

Title V is a revision of 18 U.S.C. 207, which is the major statute concerning restrictions on post-service activities by officials and employees of the Executive Branch. The conference report contains four major subsections.

Subsection (a) and (b) establish restrictions based upon the degree of personal knowledge and association a former official or employee had with a particular matter: a lifetime ban for certain matters in which the official participated personally and substantially while in office; and a two year ban for certain matters under the officer's official responsibility during the last year of government service. The length of those prohibitions are unchanged from present law, except for increasing the "official re-

sponsibility" prohibition from one to two years. The more intimate and extensive the involvement of the official, the greater the restriction is on the official's later involvement in those matters after leaving government service, on behalf of private parties. [74] Subsection (c) prohibits a former high-ranking officer or employee from contacting his former department or agency, for a period of one year, on matters of business pending before that department or agency, regardless of the nature of that proceeding or the degree of association the official had with that matter. Subsection (b), concerning partners of current Federal officials, is unchanged in substance from the present law.

Title V also contains criminal sanctions, and a provision allowing an administrative remedy, for violations of its provisions.

The major differences between the Senate bill and the House amendment were as follows:

(1) *Prohibition under 18 USC 207 (a) (lifetime ban)*

The two elements of the House amendment on 18 USC 207(a) were that a former official—

(a) "knowingly acts as agent or attorney . . . or otherwise represents . . . in any formal or informal appearance before,";

(b) "or, with the intent to influence, make any written or oral communication . . . to . . ."

The Senate bill provisions on 18 USC 207(a) stated that a former official may not knowingly "aid, assist or represent" on certain matters.

The conference adopted the House provision. It is understood that the two elements of the House language, as set forth above, are each independent of the other for the purposes of a violation of any subsection in which those terms appear. It is also understood that the terms "agent

or attorney, or otherwise represents", as used in subsections (a), (b), and (c), are intended to include appearances in any professional capacity, whether as attorney, consultant, expert witness, or otherwise.

2. *Two year "aiding and assisting" provision 18 USC 207(b)(ii)*

The House amendment estimated a two year restriction against a former official who "aids or assists in representing . . . in any formal or informal appearances before" an agency or department on certain matters.

The comparable provision in the Senate bill (mentioned in 1 above) was a lifetime ban.

The conference provided, in subsection (b)(ii), for a two year restriction against a former official who "knowingly represents, or aids, counsels, advises, consults, or assists in representing any other person (except the United States) concerning any formal or informal appearance before . . .". It is the intention of the conference that this provision will prohibit a former officer or employee from subsequent consultation on a matter, in which he was personally and substantially involved while in office, even though he is not representing a party in that matter.

3. *Prohibition under 18 USC 207 (c) (one year "no contract")*

The two elements of the House amendment on 18 USC 207(c) were that a former official—

(a) "knowingly acts as agency or attorney . . . or otherwise represents . . . in any formal or informal appearance before,";

(b) "or, with the intent to influence, make any oral or written communication . . . to . . ."

The Senate bill covered any former official, who "knowingly—(1) makes any appearance or attendance before,

or (2) makes any written [75] or oral communication to, and with the intent to influence the action of . . .”

The Senate bill also included in 18 USC 207(c) those matters “pending” before the former agency. The House amendment had the same language, but also prohibited contact with the former agency on any matters “in which such department or agency has a direct and substantial interest . . .”

The conference adopted the House prohibition, with the modification that 18 USC 207(c) will include self-representation. The conference also adopted the House language, contained in subsection (c)(3), to prohibit contact by a former official with his former agency, either on matters pending before that agency or on matters in which the former agency has a direct and substantial interest. Thus contact is proscribed, even though the matter is pending elsewhere and not before the agency itself, provided that the agency has a “direct and substantial interest” therein.

* * * *

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term
Grand Jury Sworn on January 15, 1987

Criminal No. —

THE UNITED STATES OF AMERICA

v.

FRANKLYN C. NOFZIGER
MARK A. BRAGG

Violations: 18 U.S.C. §§ 2, 207 (c)
(Violations of, and aiding and abetting and causing
violations of, the Ethics in Government Act)

INDICTMENT

The Grand Jury charges:

COUNT ONE

AT ALL TIMES MATERIAL HEREIN:

1. Defendant FRANKLYN C. NOFZIGER (hereinafter "NOFZIGER") was appointed by the President of the United States to be Assistant to the President for Political Affairs in the Executive Office of the President

(hereinafter "the White House"), a position in which defendant NOFZIGER was employed from January 21, 1981, through January 22, 1982.

2. Defendant MARK A. BRAGG (hereinafter "BRAGG") was a businessman who met defendant NOFZIGER in California before defendant NOFZIGER's appointment as Assistant to the President. While defendant NOFZIGER was still serving as the Assistant to the President for Political Affairs, defendants NOFZIGER and BRAGG agreed that they would become business partners immediately after defendant NOFZIGER left the White House. One of their business ventures was called Nofziger-Bragg Communications.

3. - Nofziger-Bragg Communications was a joint venture, created pursuant to an agreement executed on or about January 22, 1982 by defendants NOFZIGER and BRAGG, which engaged in consulting, government-relations, and lobbying activities. Welbilt Electronic Die Corporation, Fairchild Republic Corporaton, and National Marine Engineers Beneficial Association, AFL-CIO were among those on whose behalf defendants NOFZIGER and BRAGG lobbied the White House and other agencies of the United States Government.

4. Welbilt Electronic Die Corporation (hereinafter "Welbilt") was a minority-owned company located in the South Bronx, New York City. Welbilt sought to obtain contracts from the United States Government, including a contract to manufacture more than 13,000 small six-horsepower engines called standard military engines (hereinafter the "engine contract") for the Department of the Army (hereinafter the "Army").

5. The Section 8(a) program was a program administered by the United States Small Business Administration (hereinafter the "SBA") under which Welbilt was eligible for special preference, subsidies and other assistance in obtaining the Army engine contract. Pursuant to the

Section 8(a) program, the SBA designated Welbilt as the only company that the Army should consider to manufacture the engines. The Army had authority to withdraw the engine contract from the Section 8(a) program and to solicit competitive bids from other companies if the Army, Welbilt and the SBA could not reach an agreement on a price for the engines that was satisfactory to the Army.

6. During 1982, after defendant NOFZIGER left the White House, defendants NOFZIGER and BRAGG lobbied the White House, the Army and the SBA to persuade the Army not to withdraw the engine contract from the Section 8(a) program so that Welbilt would be awarded the engine contract.

7. As Assistant to the President for Political Affairs, defendant NOFZIGER was employed at a rate of pay comparable to or greater than that fixed according to subchapter II of chapter 53 of title 5, United States Code, and thus was a covered person under the provisions of 18 U.S.C. §§ 207(c) and (d). Hereinafter, the words "covered person" in Counts One, Two, Three, and Four incorporate this paragraph in its entirety.

8. On or about April 8, 1982, within one year after his employment as Assistant to the President had ceased and within the District of Columbia, defendant NOFZIGER, having been employed at a rate of pay of a covered person under the provisions of 18 U.S.C. §§ 207 (c) and (d), with the intent to influence, made a written communication on behalf of Welbilt to Edwin Meese III, who was then Counsellor to the President and an officer and employee of the United States and of the White House. That written communication of defendant NOFZIGER was made in connection with the particular matter of the proposed Army engine contract in which the White House then had a direct and substantial interest.

All in violation of 18 U.S.C. § 207(c).

COUNT TWO

AT ALL TIMES MATERIAL HEREIN:

1. The Grand Jury realleges and incorporates by reference in this Count paragraphs 1 through 7 of Count One.

2. On or about May 27, 1982, defendant BRAGG advised and directed defendant NOFZIGER to contact James E. Jenkins, who was then Deputy Counsellor to the President, for the purpose of influencing Jenkins on behalf of Welbilt in connection with the particular matter of the proposed Army engine contract.

3. On or about May 28, 1982, within one year after his employment as Assistant to the President had ceased and within the District of Columbia, defendant NOFZIGER, having been employed at a rate of pay of a covered person under the provisions of 18 U.S.C. §§ 207(c) and (d), with the intent to influence, made a written communication on behalf of Welbilt to James E. Jenkins, who was then Deputy Counsellor to the President and an officer and employee of the United States and of the White House. That written communication of Defendant NOFZIGER was made in connection with the particular matter of the proposed Army engine contract in which the White House then had a direct and substantial interest.

4. Defendant MARK A. BRAGG, within the District of Columbia and elsewhere, aided, abetted, counseled, induced, procured, and willfully caused defendant NOFZIGER to commit the offense charged in paragraph three of this Count.

All in violation of 18 U.S.C. §§ 2 and 207(c).

COUNT THREE

AT ALL TIMES MATERIAL HEREIN:

1. The Grand Jury realleges and incorporates by reference in this Count paragraphs 1 through 3 and 7 of Count One.

2. The National Marine Engineers Beneficial Association, AFL-CIO (hereinafter "MEBA"), was a labor union representing licensed maritime officers which lobbied for programs affecting the maritime industry, including expending the use of civilian manning for ships of the United States Government. MEBA was a client of Nofziger-Bragg Communications on behalf of which defendant NOFZIGER lobbied agencies of the United States Government, including the White House.

3. The White House was directly and substantially interested in expanding the use of civilian manning for ships of the United States Government as a means to strengthen the United States maritime industry, an initiative that was promoted by the President of the United States and others. Among other actions at the White House, in 1982 the matter of expanding the use of civilian manning for ships of the United States Government was the subject of deliberations and decisions by the President and the Cabinet Council on Commerce and Trade that included a commitment to expand the use of civilian manning.

4. The particular matter that was the subject of lobbying on behalf of MEBA by defendant NOFZIGER was expanding the use of civilian manning of ships of the United States Government, an initiative that had been adopted and endorsed by the President of the United States.

5. On or about August 20, 1982, within one year after his employment as Assistant to the President had ceased and within the District of Columbia, defendant

NOFZIGER, having been employed at the rate of pay of a covered person under the provisions of 18 U.S.C. §§ 207(c) and (d), with the intent to influence, made a written communication on behalf of MEBA to James E. Jenkins, who was then Deputy Counsellor to the President and an officer and employee of the United States and of the White House. That written communication of defendant NOFZIGER was made in connection with the particular matter of expanding the use of civilian manning for ships of the United States Government, in which the White House then had a direct and substantial interest.

All in violation of 18 U.S.C. § 207(c).

COUNT FOUR

AT ALL TIMES MATERIAL HEREIN:

1. The Grand Jury realleges and incorporates by reference in this Count paragraphs 1 through 3 and 7 of Count One.

2. Fairchild Republic Corporation (hereinafter "Fairchild") was a division of Fairchild Industries, Inc., a major defense contractor. Fairchild assembled its major product, an A-10 anti-tank aircraft (hereinafter the "A-10"), in a factory located in Farmingdale, New York, on Long Island.

3. Prior to 1982, a number of A-10s had been purchased by the Department of the Air Force (hereinafter the "Air Force") in the Department of Defense. In 1981, Fairchild and its agents lobbied the Department of Defense, the White House and Congress to keep funding for the purchase of more A-10s in the President's budget for the Department of Defense for Fiscal Year 1982. During 1982, Fairchild and its agents lobbied the Department of Defense, the White House and Congress to keep funding for the purchase of more A-10s in the President's budget

for the Department of Defense for Fiscal Year 1983. The Fiscal Year 1983 budget for the Department of Defense submitted by the President to Congress included a request for the purchase of a number of A-10s at a cost of approximately \$20 million for each aircraft. Congress did not authorize the expenditure of any money for the purchase by the Air Force of any A-10s for Fiscal Year 1983. Thereafter, Fairchild and its agents lobbied the White House, the Department of Defense and Congress to support other ways of funding production of the A-10, including promoting sales of the A-10 to foreign countries and reprogramming Department of Defense funds to purchase A-10s.

4. Stanton D. Anderson, a member of a Washington, D.C., law firm, was hired by Fairchild as a lobbyist to lobby the United States Government concerning the A-10. Shortly after defendant NOFZIGER left the White House in 1982, Anderson asked defendant NOFZIGER to lobby the White House concerning the A-10 on behalf of Fairchild.

5. As a result of lobbying efforts on behalf of Fairchild, the A-10 was the subject of a directive of the President of the United States that A-10 production be continued, that foreign military sales be facilitated, or that purchase of the aircraft be supported by reprogramming Department of Defense funds.

6. The particular matter that was the subject of lobbying by defendant NOFZIGER on behalf of Fairchild at the request of Anderson and his law firm was obtaining funding for continued production of the A-10 and implementing the directive of the President of the United States concerning the A-10.

7. Funding for the A-10 was a matter of direct and substantial interest to the White House in that the A-10 was a military aircraft, which was the subject of decisions and actions at the White House including the direc-

tive by the President referred to in paragraphs 5 and 6 of this Count.

8. On or about September 24, 1982, within one year after his employment as Assistant to the President had ceased and within the District of Columbia, defendant NOFZIGER, having been employed at the rate of pay of a covered person under the provisions of 18 U.S.C. §§ 207(c) and (d), with the intent to influence, made an oral communication on behalf of Fairchild to staff members of the National Security Council, who were officers and employees of the United States and of the White House. That oral communication of defendant NOFZIGER was made in connection with the particular matter of obtaining funding for continued production of the A-10 and implementing the directive of the President of the United States concerning the A-10, in which the White House then had a direct and substantial interest.

All in violation of 18 U.S.C. § 207(c).

A True Bill.

Foreman

Independent Counsel

APPENDIX I
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case Number 87-0309

February 10, 1988

Courtroom 5

U.S. Court House
Washington, D.C.

UNITED STATES OF AMERICA

vs.

FRANKLYN C. NOFZIGER and
MARK A. BRAGG

Before the Honorable Thomas A. Flannery, United
States District Judge, commencing at 10:15 a.m.

Reported by:

Bonnie L. Gahagan

* * * *

[4122]

* * * *

The essential elements of 18 U.S.C. Section 207(c) as
charged in this case are as follows:

One, that Defendant Nofziger had been a [4123] senior
employee of the executive branch of the United States
Government, as defined by law.

Two, that Defendant Nofziger made a communication
alleged in a count.

Three, that the communication was made on behalf of
anyone other than the United States Government.

Four, that the communication was made within one year after Defendant Nofziger left his employment as assistant to the President.

Five, that the communication was made to Defendant Nofziger's former agency or to an officer or employee of his former agency.

Six, that the communication was in connection with a particular matter.

Seven, that the particular matter was of direct and substantial interest to the White House at the time of the alleged communication.

Eight, that the communication was made with the intent to influence.

I have just listed eight elements. Now I am going to further define each of those eight elements.

Now, one element of each of the 207 offenses that has been charged that Defendant [4124] Nofziger must have been employed by the United States, as specified in subsection (d) of the statute, at a certain rate of pay established by law.

There has been a stipulation of testimony by both defendants that Defendant Nofziger held the position of assistant to the President for political affairs between January 21st, 1981 and January 23rd, 1982, and that during that period he was paid the rate of \$60,662 per year. This is an amount which, as a matter of law, satisfies this element of the offense because it exceeds the rate of pay specified by law for this element.

Another element is that Defendant Nofziger must have made the communication charged in the count. The communications charged in Counts I, II and III were written communications. You may find that a written communication was made by Defendant Nofziger if it was signed by Defendant Nofziger himself.

The communication charged in Count IV, the Fairchild count, is an oral communication alleged to have been made by Defendant Nofziger at a meeting he attended with members of the staff of the National Security Council. To find that that oral communication was made, you must find that Defendant [4125] Nofziger attended that meeting and that at that meeting he made oral statements as alleged in the indictment.

Another element of the offense is that Defendant Nofziger must have made the alleged communication on behalf of anyone other than the United States. Counts I and II each allege that a communication was made on behalf of the Welbilt Electronic Die Corporation, known as Welbilt.

Count III alleges that a communication was made on behalf of the Marine Engineers Beneficial Association, a labor union organization known as MEBA.

Count IV alleges that a communication was made on behalf of the Fairchild Republic Corporation, known as Fairchild.

Another element is that the communication alleged in a count must have been made within one year after Defendant Nofziger left his government employment. The indictment alleges that the alleged communications occurred on or about April 8, 1982 for Count I; May 28th, 1982 for Count II; August 10th, 1982 for Count III; and September 24th, 1982 for Count IV. -

There has been a stipulation of testimony [4126] by both defendants that Defendant Nofziger ceased his government employment as assistant to the President on January 23, 1982. You may regard such stipulated testimony as undisputed evidence. If you find that the communication alleged in a count was made on or about the date alleged, then the communication would have been made within one year of January 23, 1982.

Another element of this offense is that Defendant Nofziger must have made the communication alleged in the count to his former agency or to an officer or employee of his former agency. If you find that Defendant Nofziger held the position of assistant to the President for political affairs, then, as a matter of law, Defendant Nofziger's former agency was the executive office of the President, which is referred to as the White House.

I instruct you as a matter of law that the Counselor to the President, the Deputy Counselor to the President, the persons employed on the staff of the National Security Council, referred to as NSC, the persons employed by the Office of Political Affairs, the persons employed by the Office of Public Liaison, and the persons employed by the Office of Management and Budget, referred to as OMB, [4127] are all officers or employees of the executive office of the President, that is, the White House.

Count I alleges a communication to Edwin Meese, III, when he was Counselor to the President. Counts II and III each alleges a communication to James E. Jenkins when he was Deputy Counselor to the President. Count IV alleges a communication to staff members of the National Security Council.

If you find that the communication alleged in a count was made to the person alleged and that at the time that person held the position alleged, then the communication would have been made to Nofziger's former agency.

Another element of the offense is that the communication must have been made in connection with a particular matter. Counts I and II allege that the proposed Army engine contract was a particular matter. Count III alleges that expanding the use of civilian manning of ships of the United States Government was a particular matter. Count IV alleges that obtaining funding for continued production of the A-10 aircraft was a particular matter.

A particular matter can include, among other things, a proceeding, an application, a [4128] request for a ruling or other determination, a contract, a claim, or any other particular matter.

A particular matter is not a matter of general concern like poverty, unemployment or housing. Broad technical areas, policy issues and conceptual work done before a program has become particularized into one or more specific projects is not a particular matter.

Another element is that the alleged particular matter must have been a matter in which the White House had a direct and substantial interest at the time of the alleged communication.

The term "direct" refers to the nature of the interest or involvement of the White House in the matter. You may find that the interest of the White House in the matter was a direct interest if you find that an officer, employee or other representative of the White House was actively concerned with the matter. Such active interest may be shown, for example, by giving advice, by making recommendations, or by giving approval or disapproval. The White House may have a direct interest in the matter even if the final action or decision making concerning the matter may have been the responsibility of an agency other than the White [4129] House.

The term "substantial" refers to the extent and the significance of the interest or involvement of the White House in a particular matter. It is not necessary for you to find that a particular matter was of major importance to the White House as compared to other matters. In deciding whether the White House had a substantial interest in the matter, you may consider the effort devoted by officers, employees, or other representatives of the White House on the matter and the importance of the matter to the White House.

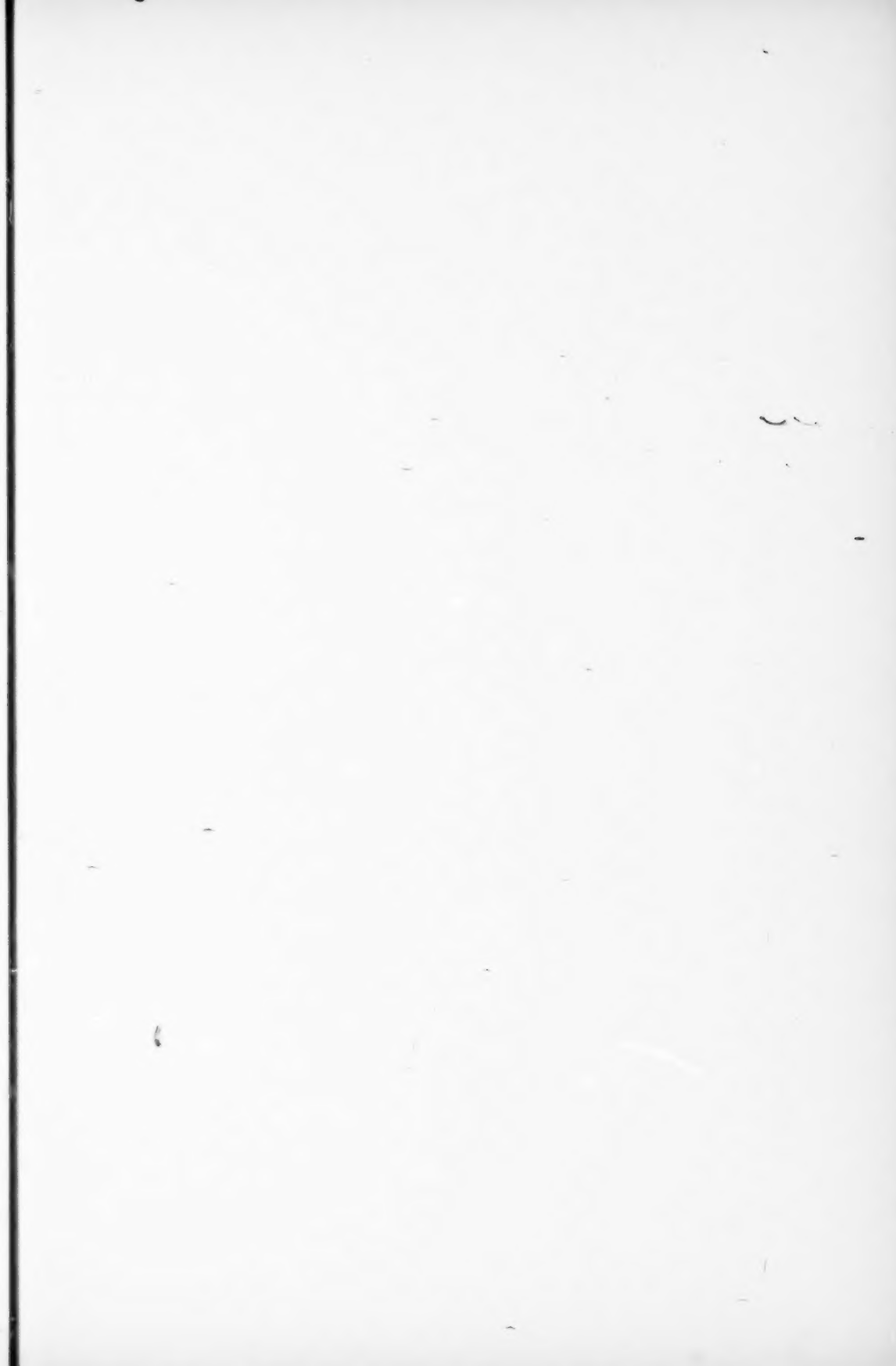
To find the defendants guilty, you must find beyond a reasonable doubt that the particular matters alleged in

the indictment were of both direct and substantial interest to the White House on the dates alleged in the indictment.

The last element of the 207(c) offense is that the Defendant Nofziger must have had an intent to influence when he made the communication allege[d] in a count. An intent to influence is an intent to affect either opinion or action. For you to find that Defendant Nofziger made a communication with the intent to influence that is required for a 207(c) offense, you must find that he intended on [4130] behalf of someone, other than the United States, to have that communication influence the opinion or action of the person who is alleged to have received the communication in connection with the alleged particular matter.

The statute prohibits a communication made with the intent to influence, and does not require the government to prove that the communication had any effect. It is thus not necessary for the government to prove that the charged communication succeeded in influencing the person to whom it was directed.

* * * *



In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

v.

FRANKLYN C. NOFZIGER, RESPONDENT

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit

**BRIEF FOR THE RESPONDENT
IN OPPOSITION**

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QUESTION PRESENTED

Whether, in a prosecution under 18 U.S.C. § 207(c), the government must allege and prove that the defendant had knowledge of the facts that would bring his lobbying activity within the statutory prohibition.



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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-719

UNITED STATES OF AMERICA, PETITIONER

v.

FRANKLYN C. NOFZIGER, RESPONDENT

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 878 F.2d 442. The memorandum opinion and order of the district court denying respondent's motion to dismiss the indictment (Pet. App. 41a-79a) and the memorandum opinion of the district court denying respondent's post-trial motions (Pet. App. 80a-105a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1989. A petition for rehearing was denied on September 5, 1989 (Pet. App. 106a-109a).

The petition for a writ of certiorari was filed on November 3, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Section 207(c) of the Ethics in Government Act prohibits certain former government employees, within one year after leaving office, from appearing before or communicating with intent to influence their former agency on any matter that is of "direct and substantial interest" to that agency. Such activities are not prohibited, therefore, if they relate to matters that are not of direct and substantial interest to the agency at the time of the contact.

1. In the instant case, respondent was convicted on three counts of communicating with his former agency, the Executive Office of the President (the "White House"). The indictment did not allege that respondent was aware of the existence of any direct and substantial White House interest in the matters that were the subject of his communications, and no proof demonstrating the presence of such knowledge was presented at trial. In so far as the evidence addressed this point at all, it showed that respondent's purpose was to create a White House interest where it was believed none existed. See Pet. App. 86a, 94a.

a. The first count on which respondent was convicted was based on a written memorandum from respondent to Edwin Meese, III, then Counselor to the President, in which respondent urged White House support for the efforts of the Welbilt Electronic Dye Corporation ("Welbilt") to obtain a contract from the Department of the Army for the manufacture of certain small engines. Pet. App. 5a-6a, 81a. The de-

cision whether to award the contract was then pending before the Army and was also of interest to the Small Business Administration, which had approved Welbilt for a noncompetitive contract award under a minority set-aside program. *Ibid.*

The evidence relied upon to show a "direct and substantial" White House interest in the contract consisted only of the unsupervised sporadic activities of a part-time White House volunteer, a few public inquiries, and general interest in the economic development of the South Bronx, where Welbilt was located. Pet App. 83a-85a. There was no evidence of any active White House interest in the matter at the time of respondent's memo and no evidence that respondent was aware of the inquiries or of the activities of the White House volunteer.

b. The second count on which respondent was convicted involved a written communication from respondent to James E. Jenkins, then Deputy Counselor to the President. *Id.* at 6a, 88a. This communication consisted in its entirety of a three-sentence postscript to a copy of a note respondent earlier had sent to a client, the Marine Engineers Beneficial Association (MEBA). The postscript related to an aspect of a maritime concept supported by MEBA known as "civilian manning," which refers to the use of civilian crews on noncombat navy vessels. The implementation of civilian manning was a matter under the responsibility of the Department of the Navy. *Id.* at 88a.

The evidence with respect to civilian manning showed that it was a maritime policy supported by the White House. It had been the subject of one brief exchange at a Cabinet Council meeting, had been mentioned in one document about maritime

policies, and was the subject of one meeting chaired by a White House staff member and a representative of MEBA. *Id.* at 89a-92a. Again, there was no evidence that respondent knew anything about these meetings or the maritime document.

c. The final count on which respondent was convicted involved a communication to staff members of the National Security Council (NSC) seeking support for continued funding for the Fairchild Republic Corporation's A-10 aircraft. *Id.* at 6a, 92a-94a. The evidence concerning funding of the A-10 showed that that decision was a part of the Defense Department budgeting process. The White House supported funding for continued production of the A-10, support that was manifested by a letter to the Defense Department expressing the President's position. *Id.* at 92a-94a.

There was no dispute that these charged communications occurred, or that respondent made them with the requisite "intent to influence." What was in dispute was (1) whether the White House in fact had a "direct and substantial" interest in the matters that were the subject of his communications and (2) whether respondent knew of any reason why he would be barred from making the communications in question. The latter issue, however, was removed entirely from the trial as a result of the district court's ruling that knowledge need not be proved. *Id.* at 55a-61a. Indeed, respondent's proffer of testimony regarding certain advice he received from his lawyer, who was present when one of the communications was made, was excluded as immaterial. See 2/5/88 Tr. 3549-50, 3578-79.

2. Respondent appealed his convictions contending, *inter alia*, that the Independent Counsel (IC), the

petitioner here, had failed to allege in the indictment or prove at trial that respondent had the requisite *mens rea* for conviction under the statute.¹ The court of appeals reversed the convictions. A majority of the court agreed that the indictment was invalid because it did not require the prosecution to prove that respondent had knowledge of the facts that made his conduct unlawful. The court noted (Pet. App. 8a) that the statute did not prohibit lobbying for the purpose of stimulating an interest where no substantial interest existed. It then posed the question presented regarding the reach of the knowledge requirement as follows (*id.* at 4a; emphasis in original):

If Nofziger's interpretation is correct, no one may be convicted under subsection 207(c) unless it is proven that he had knowledge of each of the facts constituting the offense. On the other hand, under the government's interpretation, if an ex-official tries to interest his former agency in a particular project in the mistaken belief that it had no "direct and substantial interest" in it, he will have committed a felony punishable by up to two years in jail.

In the court's view, the IC's interpretation of Section 207(c) "would impose strict criminal liability

¹ Respondent also contended (1) that the meager evidence of White House interest in the Army engine contract and civilian manning was insufficient to show the existence of a "substantial" agency interest, (2) that none of the matters were ones in which there was a "direct" agency interest, because none were within the official responsibilities assigned by Constitution, statute, or regulation to the Executive Office of the President, and (3) that the interpretation given Section 207(c) by the district court rendered that provision unconstitutionally vague as applied to respondent. Because of the court of appeals' disposition of the case, it had no occasion to reach these issues.

on a lobbyist (by definition, one who communicates with the intent to influence) who is misinformed as to what matters are of current interest to his former employer." Pet. App. 8a-9a. After considering the language, legislative history, and official interpretations of the statute, the court found no support for the IC's contention that Section 207(c) "unambiguously limits the reach of 'knowingly' to the appearance clause." *Id.* at 21a. The court ruled that the statute was ambiguous, and it resolved the ambiguity by applying basic canons of statutory construction—the rule of lenity and the presumption in favor of *mens rea*. The court held that those "time-honored" rules "dictate" that the court interpret the statute "as requiring the government to demonstrate that Nofziger had knowledge of the facts that made his conduct criminal." *Id.* at 27a. In so holding, the court rejected the IC's argument that Section 207(c) is a "public welfare" offense requiring no *mens rea* because, in part, of the potential for chilling First Amendment activity if strict liability were imposed.

Judge Edwards dissented. Based on his analysis of the placement of commas and the absence of additional clarifying punctuation, Judge Edwards concluded that the IC's interpretation was compelled by the statutory language. Pet. App. 36a. He also believed that certain passages in the Conference Committee Report "plain[ly] indicat[ed] * * * congressional intent" to dispense with any knowledge requirement in the case of communications by an employee with his former agency. *Id.* at 29a. Finding "no ambiguity to resolve" (*id.* at 28a), Judge Edwards was of the view that application of the rule of lenity or the presumption of *mens rea* was unwarranted in this case.

ARGUMENT

I. THIS CASE INVOLVES NO ISSUE OF PRACTICAL OR LEGAL IMPORTANCE

Rarely has a certiorari petition filed in the name of the United States sought review of an issue so lacking in legal or practical importance as the issue of statutory interpretation proffered by the Independent Counsel in this case.² And rarely has such candor been displayed as in the IC's concession (Pet. 7) that "there is no conflict in the circuits on the meaning of [Section 207(c)], no other court has addressed the issue, and no conflict is likely to arise if the decision below goes unreviewed." Moreover, the holding of the court of appeals that the prosecution must establish the defendant's knowledge of facts underlying an essential element of the Section 207(c) offense is in the mainstream of traditional criminal law principles. The reasons given by the IC why this Court should nevertheless grant the petition are wholly unpersuasive.

² From its inception, the investigation and prosecution of respondent has been conducted by an Independent Counsel. While the IC clearly is vested by law with the powers of the Department of Justice in this matter, the institutional differences between the Department of Justice and an Independent Counsel have had profound consequences for respondent. The most obvious and important one concerns the exercise of prosecutorial discretion in deciding whether to prosecute a case like this one. The IC's theory of prosecution—that respondent violated the Act even though he had no knowledge of the facts that brought his otherwise lawful contact within the statutory prohibition—would have been an unlikely one for the Department of Justice to pursue when it concededly (see Pet. 17) is contrary to the interpretation of the Act set forth in the Department's own regulations.

1. The IC invites review on the ground that "[t]he issue of ethics in government is an important one." Pet. 8. That may be true, but it hardly serves to distinguish this case from most other criminal cases. Bribery, counterfeiting, espionage, fraud, murder, obstruction of justice, racketeering, and most other matters addressed in Title 18 of the United States Code are also important subjects of federal regulation. But the general importance of the governmental interest served by a statute simply is not in itself a very significant indicator of the need for review by this Court. Rather, it is the importance of the particular legal issue presented that counts. The issue here has not surfaced in a single other case, is not likely to do so in the future (as the IC virtually concedes), and, as discussed below, poses little danger to the interests served by the underlying statute. In such circumstances, the need for review by this Court is nonexistent.³

2. The IC asserts that requiring the prosecutor to prove that a defendant had knowledge of his former

³ We are advised by the Department of Justice that there has never been another prosecution under Section 207(c). And prosecutions under other parts of Section 207 are also exceedingly rare. Between adoption of the current version of the Ethics in Government Act in 1978 and 1987, when data was compiled for submission to the district court in this case, there had been but four indictments under Section 207. See *Appropriations for the Admin. Conference of the United States: Hearing on H.R. 2153 Before the Subcomm. on Admin. Law and Gov't Relations of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 65-74 (1986) (letter submitted by John C. Keeney, Deputy Assistant Attorney General, Criminal Division, Department of Justice). And this case is the only appellate decision interpreting any part of Section 207.

agency's direct and substantial interest in the subject of his communication "will seriously impede prosecutions under the Act." Pet. 7. Nothing could be farther from the truth. It is commonplace in the criminal law that the prosecution is obliged to prove a defendant's knowledge of the facts that render his conduct unlawful—something that can ordinarily be done without great difficulty by means of documents, admissions of the defendant, or inferences drawn from the surrounding circumstances.

That is especially true in proving a defendant's knowledge of his former agency's direct and substantial interest in a matter in a Section 207(c) prosecution. In the vast majority of cases in which a covered individual lobbies his former agency—for example, a former Justice Department official seeking to forestall indictment of a client or a former Defense Department official pressing for award of a procurement contract to a client—the subject matter of the lobbying will plainly and demonstrably be one of direct and substantial interest to the agency. Because the defendant's knowledge ordinarily is easily proven, the prosecution's task would not be materially affected by the holding that such proof is required. That the instant case involves the Executive Office of the President, one of the few agencies that may become interested in matters not obviously pending before it, simply makes the need for proof of knowledge in such rare cases all the more compelling.

3. The decision below will not significantly curtail prosecutorial discretion under the Ethics in Government Act. As the IC concedes (Pet. 17), the court of appeals' construction of the statute accords with the interpretation contained in Department of Jus-

tice regulations. See 28 C.F.R. § 45.735-7(d); see also Pet. App. 21a. The Department is the agency ordinarily responsible for enforcement of the criminal sanctions of the Act. This consistency between executive and judicial interpretations is further proof, if any were needed, that the IC's expressed fear of "serious" adverse practical consequences is nothing more than empty rhetoric.

4. Moreover, the ruling of the court of appeals is unlikely to have enduring practical significance for the additional reason that the provision of the Ethics in Government Act that it interpreted is on the verge of being replaced. On November 17, 1989, Congress passed and sent to the President the Ethics Reform Act of 1989, which repeals Section 207(c) and contains an entirely new version of post-employment lobbying restrictions. H.R. 3660, 101st Cong., 1st Sess. (1989). Under the new statutory language, "knowingly" and "with intent to influence" each unambiguously applies to both appearances before and communications with the former agency, but the requirement of a "direct and substantial" agency interest is eliminated. See 135 Cong. Rec. S16060, H8991 (daily ed. Nov. 17, 1989).⁴ If the President signs this bill into law, as he has indicated he will do (see *Washington Post*, Nov. 18, 1989, at 1, col. 1), the correctness of the court of appeals' interpretation of the language in the repealed statute will plainly be of no continuing importance.

⁴ Needless to say, if a clear lobbying ban covering any attempts to influence the former agency had been in effect at the time of respondent's communications in 1982, there is no reason to suppose that respondent would have undertaken his efforts to generate White House interest in his clients' projects.

5. The IC's suggestion (*e.g.*, Pet. 8) that the decision below works some significant change in the general fabric of the criminal law by distorting the rule of lenity and the presumption in favor of *mens rea*, and that the ruling could therefore have an adverse impact on the enforcement of other criminal or regulatory statutes, is entirely unfounded. The disagreement between the majority and the dissent below centered on the question whether, in view of its particular language, punctuation, and legislative history, Section 207(c) is ambiguous. The resolution of that question has no importance to the construction of any other statute. Moreover, the application of the presumption of *mens rea* and the rule of lenity to the determination that Section 207(c) is ambiguous constituted an entirely unsurprising and uncontroversial invocation of accepted legal principles that requires no further review.

6. A related contention advanced by the IC (Pet. 8-9) is that the ruling below undermines the purported duty under the Ethics in Government Act "to make inquiry" and obtain "clearance" before engaging in contacts even if those contacts appear to the former employee to be lawful. In fact, neither Section 207(c) nor its implementing regulations set forth any such obligation.⁵ In any event, this argument does not show that the case has far-reaching importance, but is merely an argument (the soundness of which we do not concede) why the ambiguity in this particular statute should be resolved in the IC's favor.

⁵ It would seem wholly inconsistent to suggest that there is a duty of inquiry but then to obtain exclusion at trial of evidence of respondent's efforts, through his lawyers, to determine whether he was acting in conformity with the requirements of the statute. See 2/5/88 Tr. 3549-50, 3578-79.

In sum, the petition assigns a wholly unrealistic significance to this case. Far from being "seminal" (Pet. 7), this case is a legal and practical dead end that would not warrant review even if incorrectly decided.⁶ And as we now show, the IC's claims of error in the decision below are wholly unfounded.

II. THE DECISION OF THE COURT OF APPEALS IS CORRECT

Not only is the legal issue presented by the petition of little consequence either to the administration of the Ethics in Government Act or more generally to the administration of federal criminal law, but the IC's grounds for challenging the correctness of the decision of the court of appeals are insubstantial.

1. *The nature of the Section 207(c) prohibition.* Section 207(c) prohibits certain government officers and employees from:

knowingly act[ing] as agent or attorney for, or otherwise represent[ing], anyone other than the United States in any formal or informal appearance before, or, with intent to influence, mak-

⁶ The IC reads too much (Pet. 10) into Judge Edwards' statement in connection with the denial of rehearing (Pet. App. 109a). That statement is not an expression of belief that the case warrants review by this Court, but merely a recognition of the fact that, rehearing having been denied, review by this Court represented the last available procedural option. Since the four judges who joined in the statement did not believe that the perceived error in the panel's decision was important enough to require the attention of the full court of appeals, it would seem to follow *a fortiori* that the decision, even if it were erroneous, would not warrant review by this Court.

[ing] any oral or written communication on behalf of anyone other than the United States to—

- (1) the department or agency in which he served * * *, and
- (2) in connection with any * * * proceeding, application, [etc.] * * * or other particular matter, and
- (3) which is pending before such department or agency or in which such department or agency has a direct and substantial interest * * *.

It is undisputed that Section 207(c) prohibits lobbying only with respect to particular matters that are either pending before the covered person's former agency or of direct and substantial interest to it. Accordingly, as the court of appeals correctly observed, an individual "may lawfully lobby his former agency the day after he has left it with the purpose of *stimulating* its interest in a matter of importance to a private client *so long as* that matter is not already before the agency and the agency does not already have a direct and substantial interest in it." Pet. App. 8a (emphasis in original).

This point, which the IC does not contradict, is critical to understanding the legal framework of the case. If the requirement of knowledge were not construed to apply to the facts that determine whether a communication is permitted or proscribed, a significant element of strict liability would be introduced into this felony statute. Because strict liability is disfavored in our criminal law (see *Liparota v. United States*, 471 U.S. 419, 426 (1985)), the IC was

rightly required to shoulder the burden of showing that his interpretation carried out the unmistakable intent of Congress—a burden he has wholly failed to satisfy.

2. *Plain meaning of the statute.* Section 207(c) defines an offense that may be committed by a former government officer in either of two ways: by appearing before his former agency on behalf of another on a matter pending before the agency or of direct and substantial interest to it; or by communicating with his former agency with the intent to influence it in connection with such a matter. The delineation of these two forms of prohibited conduct is preceded by the word “knowingly,” and the issue is whether that word (a) applies to communications as well as to appearances, and (b) travels to the end of the statute, requiring knowledge of the matters specified in subparagraphs (1)-(3).

a. The IC takes the position (Pet. 10) that the statute “naturally breaks into two offenses, each with its own state-of-mind requirement.” According to the IC’s interpretation, “‘knowingly’ is the mental element for the appearance offense and ‘with the intent to influence’ is the mental element for the communication offense.” Pet. 11. This argument, depends, however, on a subtle rewriting of the statute. The “break” on which the IC depends to limit the reach of “knowingly” would not appear so “natural” if the IC had not inserted Roman numerals in the language of the statute at locations of its choice. See Pet. 10. The ambiguity of the language could as easily be cleared up—but in *respondent’s* favor—simply by moving the Roman numeral “I” from just before “knowingly” to just after it.

b. The IC's interpretation of Section 207(c) depends, in large part, on two invalid premises. The first is that because the communication clause contains a specific intent requirement ("intent to influence"), it cannot also be subject to another mental element ("knowingly"). But as the court of appeals explained (Pet. App. 17a-18a), "[t]here is nothing in law or logic * * * to suggest that a specific *mens rea* cannot coexist with one of more general application." The Model Penal Code "provides several analogies that would support the applicability of both *mens rea* requirements to the communications offense." *Id.* at 18a. And the comments to the Model Penal Code make clear that "notwithstanding the requirement of a specific purpose, the culpability required as to other elements of the crime is satisfied if the person acted 'purposefully, knowingly or recklessly.'" *Ibid.*, quoting Model Penal Code § 2.02(3). The IC offers no response to these points.

Second, the IC mistakenly believes (see Pet. 17, 19, 23, 24) that, simply because it is a "mental" element, the presence of an "intent to influence" requirement fulfills the purpose for requiring proof of *mens rea* or a guilty mind, *i.e.*, to assure that appropriate culpability exists to justify a felony conviction. This view exalts form over function, for in this statute the specific "intent to influence" requirement fails to perform the function of distinguishing between lawful and unlawful conduct. While the existence of an "intent to influence" makes a communication a contact that is *potentially* covered by the statute (*i.e.*, not a social contact, a request for information, or a routine status inquiry), it does not, as noted previously, make the contact illegal.

It is therefore necessary, in order to distinguish between prohibited and permitted communications

made with the intent to influence, that the former employee know that the matter is pending before his former agency or that it is one in which his former agency has a direct and substantial interest. If he is without such knowledge, he lacks the guilty mind that is ordinarily a prerequisite to conviction under our system of criminal justice. See *Morissette v. United States*, 342 U.S. 246, 250 (1952) (The requirement of guilty knowledge "is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.").

c. The IC's reading of the statutory language, even if syntactically tenable, produces an absurd meaning. Significantly, the petition never explains what role "knowingly" performs under the IC's interpretation. There are only two possibilities. The first is that "knowingly" modifies only the phrase that is immediately adjacent. Under that view, the prosecution would need to show merely that the former official knew that he was making an appearance on behalf of another. But that construction gives an utterly trivial role to the knowledge requirement. As the court of appeals observed (Pet. App. 19a), "'it hardly seems likely that th[e] improbable scenario'" that "a former official might be found to have made an appearance as the implied, or unwitting, agent for someone else" is "'what Congress had in mind when it added 'knowingly' to the statute.'"

The alternative interpretation is that knowledge of the agency interest must be proven when the defendant is charged with an unlawful appearance, but not when the charge involves a communication. This would be utterly irrational. Indeed, every reason the IC gives in claiming that it is "implausible" that

Congress intended to require proof of a defendant's knowledge about his former agency's current interests (see Pet. 17-18) would apply as much to appearances as to communications.

In short, the IC can offer no plausible explanation for the function of the knowledge requirement under his construction of Section 207(c). This wholly defeats his claim that the language and structure of the statute unambiguously support his position.

3. *Legislative history of the statute.* The IC proclaims (Pet. 12) that the legislative history of Section 207(c) "is as clear and authoritative as legislative history ever gets" and that it "makes unmistakably clear that Congress intended that each of the two offenses defined by § 207(c) have its own state-of-mind requirement." In fact, however, the court of appeals correctly determined that the history is inconclusive as to the issue presented here (see Pet. App. 12a-17a).⁷

It is undisputed that the administration's proposal and the Senate version would unambiguously have adopted the court of appeals' reading of the statute. The House version, on the other hand, was quite unclear. See Pet. App. 15a.⁸ The Conference Re-

⁷ While this is not the place to undertake a detailed discussion of this rather intricate matter, the Court will find a thorough canvassing of the legislative history of Section 207 in respondent's brief in the court of appeals (at 21-24) and in the brief submitted by the ACLU as *amicus curiae* supporting respondent (at 11-17).

⁸ In his dissent, Judge Edwards twice (Pet. App. 29a, 37a) makes the critical mistake of confusing the wholly ambiguous House version with the paraphrase in the Conference Report. That paraphrase is in fact the *sole* basis for suggesting that the legislative history supports the IC's version.

port's *paraphrase* of the House version separated the appearance clause and the communication clause with a "(1)" and "(2)" that, as the court of appeals noted (Pet. App. 14a), do not appear in the provision as enacted. After a careful reading of the Conference Report, the court of appeals determined that the Report "fails to record" that the conferees "decided to adopt the House format with the conscious purpose of restricting the application of the adverb 'knowingly' to the appearance clause." Pet. App. 16a. The correctness of this view is unmistakable, and it wholly precludes the Conference Report from carrying the great weight petitioner would place upon it.

4. *Department of Justice and Office of Government Ethics Regulations.* What is most striking about the IC's argument on the regulations is his inability to point to a single one that actually interprets the statute in accordance with what he claims is its unambiguous meaning.⁹ And although the IC proffers reasons why the regulations tending to support the court of appeals' reading should be given little weight, the fact is that every regulation that bears on the issue tallies in the court's favor.

The IC concedes (Pet. 17) that the Department of Justice regulation on Section 207(c), 28 C.F.R.

⁹ In an attempt to manufacture support for his position where none exists, the IC argues (Pet. 16) that because certain regulations refer to procedures for making inquiries, that means that "the OGE thinks that former employees have a duty to inquire" and therefore that the prosecution "need not prove that a former official knew the extent of the agency's interest." Even if there were such a duty under Section 207(c), which we dispute, it hardly follows that knowledge need not be proven for a criminal conviction.

§ 45.735-7(d), actually adopts the same interpretation as that reached by the court of appeals. The IC attempts to discount this regulation on the ground that it "is not entitled to the deference due an agency charged with administering a statute." Pet. 17. But even if the Justice Department is not the "administering" agency, it certainly is the "enforcing" agency, responsible for deciding whether criminal prosecution will lie for an alleged violation. As such, its interpretation is entitled to substantial weight in a criminal prosecution under the statute. At the very least, the Department's interpretation is strong evidence that the statute cannot be "unambiguously" to the contrary, as the IC asserts.

With respect to the OGE regulations, the IC is simply wrong in arguing (Pet. 16) that the regulation on Section 207(b)(i), 5 C.F.R. § 737.7(b)(4), expresses no view as to what "knowingly" modifies. In fact, as the court of appeals found (Pet. App. 20a), that regulation demonstrates OGE's view that "knowingly" applies not only to the phrase "acts as agent, or attorney for, or otherwise represents," but also to "the circumstances that make the representation unlawful." And the IC's contention (Pet. 16) that the regulation "addresses only the appearance offense" and "not the communication offense" is contradicted by other OGE regulations, which indicate that the operative word "representation" in the Section 207(b)(i) regulation refers to *both* "acting as agent or attorney, or other representative in an appearance, or communicating with intent to influence" (see 5 C.F.R. § 737.5(b); see also 5 C.F.R. §§ 737.3(b)(1) and (3)). If nothing else, the OGE

regulation is additional evidence that the statute can be read in more than one way.¹⁰

5. *Application of the rule of lenity and the presumption of mens rea.* The IC's arguments (Pet. 19-25) that the rule of lenity and the presumption of *mens rea* were "misapplied" by the court of appeals founder for several reasons, the most basic of which we address below.

a. The IC insists that "[l]imiting the word 'knowingly' to the appearance offense does *not* 'impose strict liability for the communication offense'" (Pet. 19; emphasis in original). The IC is seriously mistaken on this point, as we have shown (see pages 15-16, *supra*). We cannot help but think that his reasoning may be clouded by his personal view (Pet. 22; emphasis supplied) that a former official who lobbies his former agency, "even if it concerns matters thought not to be of direct and substantial interest to the agency, is *not* * * * 'apparently innocent' at all."

b. The IC also misapprehends why the rule of lenity is applicable here. As the court of appeals observed (Pet. App. 22a), *two* policies underlie the rule that ambiguity in criminal statutes should be resolved in favor of the defendant. One has to do with fair warning by clear notice in the language

¹⁰ The IC's reliance (Pet. 16-17) on OGE regulations relating to Section 207(a) is wholly misplaced. Contrary to his assertion, that provision does not have the same structure as Section 207(c). Subsection (a) focuses on the former official's personal connection to the matter; it does not require that any particular agency have a direct or substantial interest therein, and it therefore creates no comparable question of the employee's knowledge.

of the statute about what conduct is prohibited, and the other relates to the principle that legislatures define what is criminal, not the courts. See *ibid.*, citing *United States v. Bass*, 404 U.S. 336, 348 (1971). It is the latter policy that is at work here, not the former.

Respondent does not claim to have lacked notice of what Section 207(c) forbids or to have been “‘surprised by a novel or unexpected interpretation of the law’” (Pet. 20). The problem here is respondent’s lack of knowledge of the *facts* that determined the legality of his conduct. Thus, the IC’s argument (*ibid.*) that “concern[s] about ‘fair warning’” are satisfied because respondent is likely to have read the statute, or had his lawyer read it, and had access to advice on permissible lobbying activities completely misses the point. The court of appeals invoked the rule of lenity not because Section 207(c) is unclear as to what is prohibited, but because the statute does not clearly evidence any intent on the part of Congress to impose strict criminal liability for violations of the Act.

c. Nor do we believe that “access” by former officials to “rulings on the legality of their proposed conduct” (Pet. 22) makes any difference here. The IC’s argument would essentially force covered individuals to seek preclearance of *every* proposed lobbying contact with their former agencies, even where, as here, there was no indication of the existence of an agency interest that might bring the statutory prohibition into play. Not only does this have the unpleasant odor of prior restraint, but it is utterly impractical. Lobbying contacts are usually highly time-sensitive, and one could hardly be as-

sured of an immediate response to an inquiry of this sort—especially where the “direct and substantial” agency interest can extend to the kind of tenuous and hidden connections relied on by the IC in this prosecution.

d. Finally, the IC notes (Pet. 24) that lobbying, though it is constitutionally protected, is properly subject to regulation by Congress. But while the First Amendment gives Congress room to regulate, the restrictions must be of the clearest sort. See *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967) (“[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity”). And to the extent Congress has not prohibited lobbying activity, that activity retains First Amendment protections. Here, the regulation that Congress deemed appropriate allows a former official to lobby his former agency on matters that are not of direct and substantial interest to the agency. Congress has not determined that a former official must “‘stay away,’” as the IC would advise (Pet. App. 26a), and First Amendment interests caution against cavalier adoption of that approach as a basis for giving a broad interpretation to the statutory prohibition that Congress did adopt.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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UNITED STATES OF AMERICA,
Petitioner,
v.

FRANKLYN C. NOFZIGER,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-719

UNITED STATES OF AMERICA,
v. *Petitioner,*
FRANKLYN C. NOFZIGER,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

Petitioner United States of America submits this brief in reply to the Brief for the Respondent in Opposition ("Opp."). For most of the points raised in the Brief in Opposition, we rely on the Petition. A few points merit attention in this Reply.

A. The heart of this case on the merits is the authoritative legislative history that with extraordinary clarity confirms the government's interpretation of 18 U.S.C. § 207(c). See Pet. 12-15. The conferees, it will be recalled, chose the House version of § 207(c) in preference to a conflicting Senate version and, in doing so, paraphrased the version they were choosing so as to make unmistakable that it described two separate offenses, to only the first of which did the element "knowingly" pertain.

Respondent has nothing of weight to say on this point. He quotes the opinion of the panel majority below (Opp. 18), where it insisted that conferees, to make authoritative their understanding of what their choice between conflicting terms of Senate and House bills means, must not only paraphrase the chosen terms in the Conference Report, but must also say something more. That misconception of the office of a conference report also underlies respondent's assertion that Judge Edwards, in dissent, "confus[ed]" the terms of the chosen House version with the conferees' paraphrase. Opp. 17 n.8. To the contrary, Judge Edwards simply took the paraphrase at its face value as an authoritative resolution of any possible ambiguity in the terms of the House version of the bill. That is what legislative history is for.

B. In a footnote, respondent states that the independent counsel's "theory of prosecution"—that § 207(c) means what the Petition contends it means—"would have been an unlikely one for the Department of Justice to pursue when it concededly * * * is contrary to the interpretation of the Act set forth in the Department's own regulations." Opp. 7 n.2. To the contrary, the independent counsel, as required by 28 U.S.C. § 594(f), took steps to ensure that his statutory interpretation and this prosecution were consistent with the practices and policies of the Department of Justice. Had he been told that the Department would never prosecute on such a theory, the prosecution would not have been brought on this theory.

C. In two places, respondent attempts to capitalize on the trial judge's exclusion of evidence relating to respondent's proffered "advice of counsel" defense. In the first place, respondent says that his proffer of testimony "regarding certain advice he received from his lawyer, who was present when one of the communications was made, was excluded as immaterial." Opp. 4. That is only part of the story. The proffered testimony (which, at the outside, went to but one of the three counts on which he was convicted) was that Nofziger's lawyer advised him in

February 1982 that it would be appropriate if Nofziger assisted him or worked with him on the Fairchild matter, as to which Nofziger did not communicate with the White House until the following September. 2/5/88 Tr. 3578-79. The judge stated that he was ruling "that if that is considered advice of counsel, that it is of questionable relevance, insofar[] as a meeting of September of '82 is concerned as set forth in Count IV of the indictment. It is too attenuat[ed]." 2/5/88 Tr. 3579. Thus the lapse of time was an independent basis for excluding the testimony, separate from the accompanying ruling that the testimony was "immaterial" because "specific intent" was not an element of the offense. Nofziger therefore did not have a good "advice of counsel" defense, regardless of the elements of the § 207(c) offense.

Nofziger's second reference is to the same ruling. He states: "It would seem wholly inconsistent to suggest that there is a duty of inquiry but then to obtain exclusion at trial of evidence of respondent's efforts, through his lawyers, to determine whether he was acting in conformity with the requirements of the statute." Opp. 11 n.5. This passage may suggest that Nofziger wanted to show that his lawyers took steps to make the inquiries that Nofziger failed to make about whether the matter was of "direct and substantial interest" to the White House. In fact, as described above, the proffer was much more limited. Moreover, the proffer related to events seven months before the communication at issue, by which time the extent of the White House interest might have changed. In any case, Nofziger did not urge in the trial court or in the court of appeals that he had a good faith belief that any of the matters he communicated about was not of "direct and substantial interest" to the White House.

D. Respondent criticizes the government for failing to explain what role the term "knowingly" performs on the government's interpretation of the statute. He claims that there are only two possibilities: first, that "know-

ingly" modifies only the phrase that is immediately adjacent, a construction that respondent says "gives an utterly trivial role to the knowledge requirement"; and, second, that knowledge of the agency interest must be proven when the defendant is charged with an unlawful appearance but not when the charge involves a communication, a construction that respondent says "would be utterly irrational." Opp. 16. It would not give "knowingly" an "utterly trivial role" to rule that it modifies only the immediately adjacent language, because by that construction "knowingly" prevents a defendant from being in violation of the law when, although it may appear to the outside world (or even to those he is lobbying) that he is appearing on behalf of a particular client, his subjective intent or understanding is different, and he is in truth exercising his citizen's right to petition. In any event, Congress chose a mental element for the communication offenses different from the one it chose for the appearance offense. The government has urged a construction of the communication offense that is faithful to the statutory language, the legislative history, and a sensible view of the congressional purpose.

E. Respondent contended that if H.R. 3660, the Ethics Reform Act of 1989, which was passed by the Congress on November 17, 1989, were to be signed by the President, then "the correctness of the court of appeals' interpretation of the language of the repealed statute will plainly be of no continuing importance." Opp. 10. The President signed the bill into law on November 30, 1989. Pub. L. No. 101-194. Nevertheless this case will continue to be an important one meriting review by this Court.

Section 101(a) of the new law amends 18 U.S.C. § 207 as a whole. Under the amended version of § 207(c), "knowingly" and "with intent to influence" each apply to both appearances before and communications with officers or employees of the former agency, but the requirement of a "direct and substantial interest" on the part of the

agency has been eliminated. See 135 Cong. Rec. S15990, S16080, H8991 (daily ed. Nov. 17, 1989). The previously existing language, however, continues to apply to officers and employees whose services terminate before January 1, 1991. §§ 102(a) & (b), 135 Cong. Rec. H8993. Thus, there can be prosecutions for the offense of which Nofziger was convicted, relying on the statutory language on which his conviction was based, at least as late as December 1996.¹ Any such prosecution of anyone who has resigned or will resign in the next 13 months, indeed, must rely on that language and not on the new version of § 207(c).² In short, the current version of § 207(c), far from being "repealed," continues to be effective and will remain so, for previously retired employees, after January 1, 1991.

¹ Pursuant to 18 U.S.C. § 3282, a prosecution can be brought five years after an offense under current § 207(c), which could be committed as late as December 1991 by an employee who resigns as late as December 31, 1990. In fact, the prosecution of Nofziger in 1987 was based on events that occurred in 1982.

² Prosecutions under the similarly-worded current version of § 207(b)(i) can be brought at least as late as December 1997, and prosecutions under the similarly-worded current version of § 207(a) are possible for the indefinite future.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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